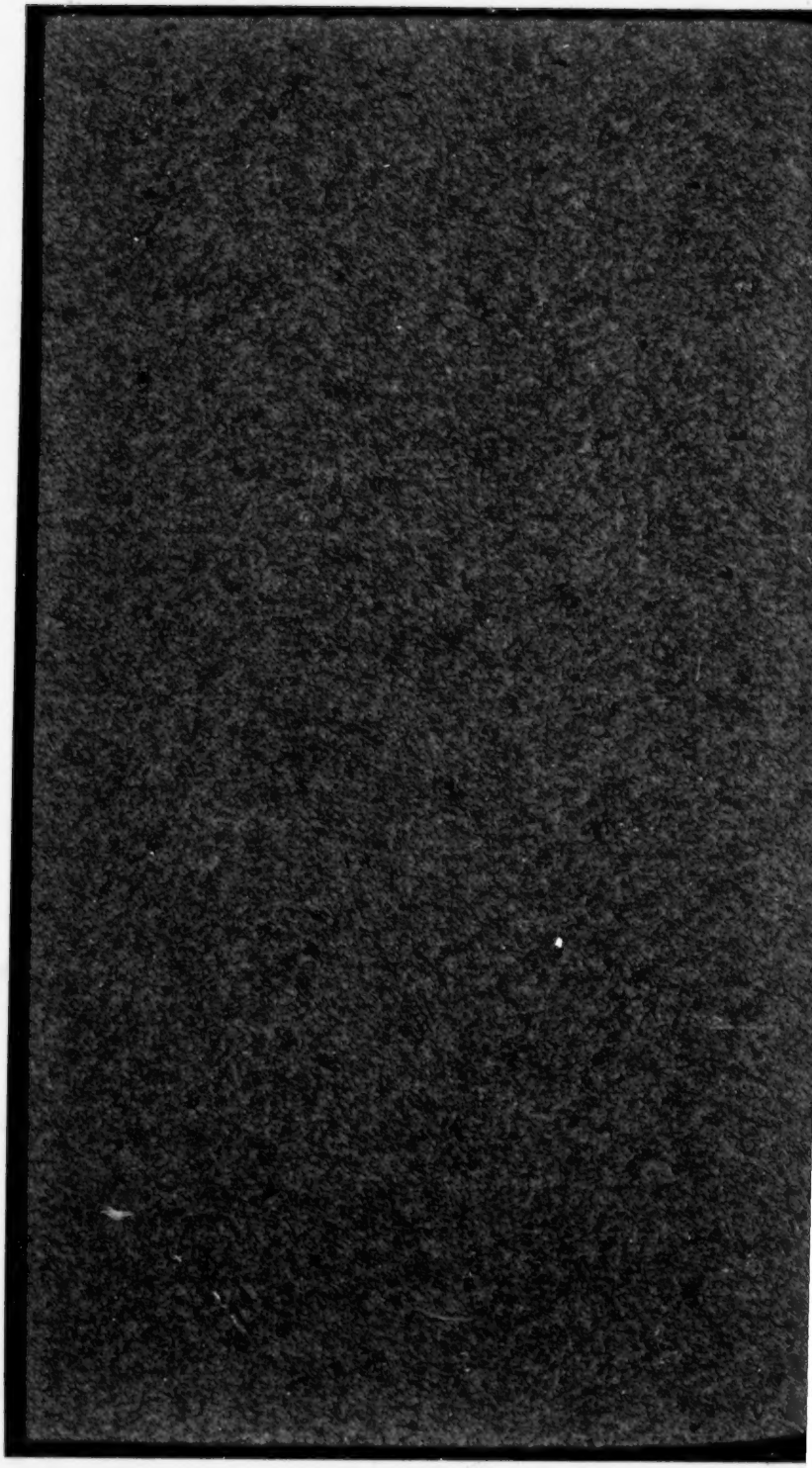

In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, complainant, *vs.* JOSEPH F. SHIPP, ET AL. } No. 5, Original.

PETITION OF DEFENDANTS, JOSEPH F. SHIPP AND JERIMIAH GIBSON:

Your petitioners, Joseph F. Shipp and Jerimiah Gibson, respectfully show unto the Honorable Court that they on the — day of ————, 1909, filed their motion for a re-hearing in the above stated cause, setting out, among other reasons, why a new trial should be granted:

I.

That the Honorable Court erred in its holding that defendants had not been purged of the alleged contempt charged against them and subjecting them to punishment for an alleged criminal contempt, thus depriving them of their liberties and right of trial by jury as provided for in criminal offences, contrary to the law of the land and the right guaranteed to American citizens.

II.

Because, as petitioners respectfully insist, the majority of the Court erred in treating the case as a Civil instead of a Criminal contempt, as if a contempt was committed by them it was criminal and not Civil, and they respectfully insist that under the record as presented in this cause the Court erred in holding that a contempt had been committed by them:

First: Because defendants by their answer deny intent to commit a contempt of the Honorable Court and the weight and preponderance of the evidence, as presented in the record, sustains defendants' answer and does not authorize or justify the conclusion or establish the guilt of defendants.

Second: Because there is no material competent or at least not sufficient competent evidence of the character required in criminal cases presented in the record as petitioners respectfully insist, to justify the conclusion of the majority of the Court in finding them guilty of contempt.

Third: Because the majority of the Court in its opinion holding defendants guilty of a criminal contempt failed to give them the benefit of the presumption of innocence to which they are entitled under the laws when applied to criminal offences. It failed to give them the benefit of a reasonable doubt which applies in this country to all trials of a criminal nature. The Court in effect adopted the rule which

requires defendants to establish their innocence, contrary to the laws and rules heretofore adhered to in this country.

III.

Because the majority of the Court erred in holding defendants guilty of contempt along lines and on matters not set out in the information, which constituted the charges against defendants and against which they had no opportunity to defend. "In this the information alleges a conspiracy between defendants and other persons to lynch and murder one Ed Johnson with the intent to show their contempt and disregard for this Honorable Court, etc." Whereas, there is no evidence, or at least there is no competent or sufficient evidence, of a competent nature to sustain this charge. The substantive, in fact the only specific charge set forth in the information on which the charge of conspiracy was founded and the charge of contempt based was that the defendant Shipp had removed the guards from the jail in order to facilitate or make more easy the work of said mob. These charges are denied by defendant, and as we respectfully insist, the evidence wholly fails to sustain them or any of the charges against these defendants.

IV.

Because the Court erred in not taking into consideration the disavowal of any intention on the part of defendants to

commit a contempt of this Honorable Court and their denial that they intentionally or knowingly committed any contempt of this Honorable Court, and therefore, in failing to discharge them, as without this intent on their part entering into their acts it should not be said there was an offense.

V.

Petitioners further show and insist, with all due respect to the Court, that it erred in holding these defendants guilty of contempt of the Honorable Court:

First: For the further reason that the information upon which the charge is based charges that the defendant Shipp was at the time of the alleged contempt the Sheriff of Hamilton County, in the State of Tennessee, (an executive officer of the State of Tennessee for said County) and that as such Sheriff was the legal custodian, under the Laws of Tennessee, of all persons duly committed in said County under the law of said State to confinement and imprisonment within said jail; "*that the said Ed Johnson was then and there a prisoner, confined and restrained of his liberty in the said jail, and in the lawful custody, and control of said sheriff, and said deputy sheriffs under commitment duly issued out of the criminal court of said Hamilton County.*"

Second: The petitioners further show unto the Honorable Court that the information as above set forth shows that it was under this commitment, duly issued out of the

Criminal Court of said Hamilton County, that said Ed Johnson was held as a prisoner at the time he was lynched and that there is no allegation in the information charging that he was a prisoner of the United States or in the custody of the United States and that notwithstanding this fact yet the record in this cause as they respectfully insist shows that your petitioners, Shipp and Gibson, did all in their power to protect said Ed Johnson from the mob or mob violence. That they exercised their best judgment from the facts known or communicated to them in the protection of prisoners, including said Johnson, at all times, as is shown in the record in this cause.

Third: That having exercised their best judgment and there being no evidence in the record that any threat or expected mob violence would take place on that night, or at the time it occurred having been communicated to them, and they having denied all the charges of the information in regard to these matters and having denied any intention to commit any contempt of the order of this Honorable Court, and having, as executive officers of the State of Tennessee, exercised their best judgment on the information they had in the premises, they are not and should not be held guilty of contempt of this Honorable Court. Especially so as under the proof in this record it is shown that the defendants and especially defendant Shipp used extraordinary care in his efforts to protect the prisoner Johnson as well as

all prisoners committed to his custody from mob violence or danger.

VI.

Petitioners further respectfully, but earnestly, insist that this Honorable Court had no jurisdiction over the case of Ed Johnson, as he was rightly in custody by commitment of the State Court which had the exclusive jurisdiction and control of the case until the State Courts had exhausted their jurisdiction, and then only when a clear case is made out showing that some Federal question was raised in the State Courts and passed upon by said Courts, which was not done in the case at bar, as we insist is conclusively shown by the record, and then only by appeal or Writ of Error could the question be raised and the Court had no jurisdiction to try the questions involved in the Johnson case under a Writ of habeas corpus.

BRIEF AND ARGUMENT.

By reference to the information it will be seen that it charges that defendant Shipp was the Sheriff of Hamilton County, Tennessee, and as such had full charge and control of the County jail and was the legal custodian, under the *Laws of Tennessee, of all persons duly committed in said county under the laws of said State to confinement and imprisonment within said jail;* that Frank Jones, Matthew Galloway, C. A. Baker, T. B. Taylor, Fred Frawley,

George Brown, Jerimiah Gibson, Marion Perkins and Joseph Clark, and each of them were deputy sheriffs, and that each of them before the hour of six o'clock on the evening of the said 19th day of March, 1906, were advised and informed of the action of the Honorable Supreme Court of the United States, with respect to the appeal of the said Ed Johnson; *that the said Ed Johnson was then and there a prisoner, confined and restrained of his liberty, in the said County jail and in the lawful custody and control of said Sheriff and said Deputy Sheriffs under a commitment duly issued out of the criminal court of said Hamilton County.*

Thus it will be seen that the information charges that the prisoner Johnson was held by the Sheriff under a commitment duly issued out of the criminal Court of Hamilton County and the record shows, as we respectfully insist, that the prisoner was never transferred as a prisoner of the United States, but was at all times held by the Sheriff under the commitment from the criminal court of Hamilton County; that no arrangement was ever made or entered into by the United States Government with the Sheriff to hold the prisoner as a prisoner of the United States.

It is further respectfully insisted on behalf of the defendants Shipp and Gibson that the allegation contained in said information that defendant Shipp and his deputies on the 19th of March, 1906, after having been advised of the

action of the Supreme Court of the United States, were informed or had every reason to believe from current reports and rumors conveyed to them, and each of them, that an attempt would be made on the evening of that day or the next morning by a mob composed of a large number of men to force an entrance and take from said jail said Ed Johnson and put him to death. *This allegation of said information we respectfully, but earnestly, insist has been fully refuted by the denial and answer of these defendants and by the testimony as set forth in this record, as has also the charge in said information that your defendant Shipp withdrew from said jail early in the evening of said day, the usual and customary guard and left in charge thereof only the night jailor, to-wit, defendant Gibson, and committed other acts and did other things evincing a purpose and disposition on the part of said Sheriff to render it less difficult and less dangerous for said mob to prosecute and carry into effect its unlawful design and purpose, to-wit, the lynching of said Ed Johnson. All these allegations are denied and they are not sustained by proof, as we respectfully insist, but on the contrary the proof establishes, as we respectfully insist, the negative of these charges and shows that there was no foundation for these allegations.*

That the allegation that defendants were informed and had every reason to believe, from current reports and rumors conveyed to them, that an attempt would be made on the

evening of the 19th of March or early in the morning of the following day to force an entrance into said jail and take Ed Johnson therefrom and put him to death, as also the charge that the usual and customary guard was removed for the purposes alleged in said information are not only denied by defendant, but disproven, as we respectfully insist, by the testimony of the witnesses examined in this cause.

First: L. G. Walker, witness for Government, is asked:

> "Had there been anything that afternoon (referring to the afternoon of March 19, 1906), to attract your attention, or anything unusual in the appearance of the streets to cause any apprehension on your part? Did you see any signs or indications of a mob or lynching?"
>
> A. "No, sir; none at all."
>
> (*Pr. Record*, 199.)

This witness is asked:

> "If there had been any noise there, anything unusual, you were in a position to have heard it, were you not?"
>
> A. "Oh, yes; I think so."
>
> (*Pr. Record*, 200.)

John L. Chivington, witness on behalf of the United States, when asked as to the effect of habeas corpus proceedings and especially the notice that there had been an appeal prayed to Supreme Court had in reference to this feeling that you have testified about?"

> A. "I would not attempt to say what the general state of feeling was. There were hot-headed

people who made hot-headed remarks, but the conservative element was then as now taking a calm view of things."

Q. "What was the effect on the hot-headed element — the lawless element — of the appeal to the Supreme Court?"

A. "*I believe that the general feeling in Chatatnooga was one of a great deal more of disappointment than of excitement.*"

(*Pr. Record*, 216.)

This witness says he went to the jail between 8:30 and 9 o'clock. He saw Sheriff Shipp. He passed in front of him as he got to the jail.

(*Pr. Record*, 217.)

There was no one with Sheriff Shipp. Does not know that the Sheriff saw him at all.

(*Pr. Record*, 217.)

Q. "Did you hear the Sheriff call on anybody to aid him?"

A. "He didn't call on me. I think I was the only outsider (meaning that he was the only person there, as we insist, outside the mob.")

(*Pr. Record*, 220.)

When asked:

"Where was Sheriff Shipp in the meantime?"

A. "When the Sheriff was first taken up he was forced into a little room. He tried to persuade the mob to leave."

(*Pr. Record*, 222.)

This witness worked for "*The Times.*" They posted

bulletins. Did not see any crowd around the bulletin.

(*Pr. Record*, 227.)

Q. "*Was it the mob that shot him or some of these bystanders that you have referred to?*"

A. "*It was people further towards the South end of the bridge.*"

Q. "*From among the bystanders as you observed at the time?*"

A. "*Yes, sir; I presume it was from among the bystanders. I should say there was several hundred shots. The firing continued until the rope broke and the negro fell.*"

Q. "While this immense fusillade was going on, and until after the negro had been killed, had a shot been fired by these men that you call the mob?"

A. "No, sir; not a shot."

Q. "*The man was killed by the shooting from these gentlemen Mr. Sanford has referred to, was he?*"

A. "*Yes, sir; that is a fact.*"

Witness said when Sheriff Shipp came he was moving rapidly. He shoved the men aside. He never stopped until he got inside the door. He was carried upstairs. *Four or five men seized him and carried him up. He asked the mob several times to disperse.*

(*Pr. Record*, 232-233.)

This witness says:

"The mob was absolutely silent except when it would come to the matter of directing how something should be done, and one man did most of the

talking. His orders were obeyed. There wasn't any noise made by the mob except what they made in breaking down the door. It was perfectly quiet except the blows they struck." Never heard of a prisoner escaping from the jail or being mobbed there during Sheriff Shipp's administration when Gibson was jailor.

(*Pr. Record*, 233.)

Witness, when asked to state what in his (Sheriff Shipp's) manner or in his action indicated to him that he (Sheriff Shipp) was about to draw a pistol, answered:

A. "*That occurred right at the door. One of the mob said to him they were there to get Ed Johnson, and they were going to get Ed Johnson.* He did not say it very mildly, and they were not there to hurt him; that they were not going to hurt the Sheriff. The Sheriff said: 'Yes, I know you are not going to hurt me.' *He said that in rather a determined tone, and as he did so, he moved his hand towards his hip, and I drew the conclusion from that that he was about to draw a weapon, when he was seized by the mob.*"

Q. "He was immediately seized, was he?"

A. "Yes, sir."

(*Pr. Record*, 234.)

The telephone to the jail had been cut off. Someone had broken the wire so it could not be used.

(*Pr. Record*, 234.)

Q. "In *The Chattanooga Times* of the 19th of March appeared an article headed 'Justice Harlan Allowed an Appeal to Ed Johnson.' Who wrote it?"

A. "I wrote it."

Witness says he went around the City during the day that this article was published, mingled with the people, and that the publication of this article on the morning of the 19th created no excitement that he saw or heard of.

Q. "*Did it arouse any mob spirit, or anything of the sort, so far as you were able to discover in your rounds?*"

A. "*No, sir; I did not hear anything about any mob all day.*"

Q. "*Ed Johnson was brought back from Knoxville on March 11, I believe you said?*"

A. "*Yes, sir; Sunday morning.*"

Q. "Had the excitement subsided after March 11th, or any demonstration of excitement?"

A. "There were no demonstrations after March 11th until March 19th."

Q. "Did you observe any demonstrations of excitement until the mob had assembled?"

A. "*No, sir; I knew nothing of it until I was told at the City hall that it was already there.*"

Q. "It was already there before you knew it?"

A. "Yes, sir."

Q. "And this case had been put especially in your charge?"

A. "Yes, sir."

Q. "And it was your business to observe and find out?"

A. "Yes, sir."

Q. "This girl that it is alleged Johnson raped — did she live in the City of Chattanooga?"

A. "No, sir; she lived out near the mountain. She lived beyond St. Elmo."

(*Pr. Record*, 237.)

Q. "And there was nothing in the atmosphere or in this tension you refer to to cause you to expect the mob would occur when it did occur?"

A. "No, sir; *I did not expect any mob on Monday night.*"

This is the Government's star witness, and it is seen how utterly it fails to establish the facts charged in the information, but on the contrary it is seen that his testimony disproves the charge.

John T. Evans, witness for Government, when asked by the Government attorney in regard to the interview that he had had with defendant Shipp, as follows:

Q. "Do you remember what he said with reference to what had caused that lynching?"

A. "Well, he said that the people of Chattanooga were perfectly willing to let the law take its course, and always had been, but that delay—"

Q. "What delay?"

A. "The delay in letting the law take its course, I suppose."

Q. "In what way? In any particular court?"

A. "I should judge, from what he said, in all courts."

Q. "Delay, in letting the law take its course, had done what?"

A. "*Was perhaps really at the bottom of the lynching.*"

(*Pr. Record*, 266.)

This is a statement of the fact as to the statements made by Sheriff Shipp in the alleged interview, published in *The Birmingham Age-Herald* of the next day, and the Court will note that this witness in testifying as to what the defendant Shipp said makes it quite different to the published interview. (Objection was made at the time to the introduction of this interview, which objection is found on page 267 of the printed record), and which objection, we respectfully insist, should have been sustained by the Court and this interview excluded. Especially so, as this witness shows in his testimony that he did not write down the interview at the time and that it was not a verbatim statement of what defendant Shipp said. He further shows that the defendant Shipp stated to him that he did not expect any trouble whatever that night.

(*Pr. Record*, 272.)

Rev. Dr. Howard L. Jones, witness in behalf of the Government, says he reached the jail after the prisoner had been taken out by the mob; that Capt. Shipp told him the prisoner had been taken and that he (Shipp) had been seized immediately when he went into the jail and had been unable to do anything.

(*Pr. Record*, 273-4.)

Carl J. Rowden, witness in behalf of the Government, lived in about twenty-five feet of the jail; was at home the night of the lynching.

(*Pr. Record*, 274-5.)

He (Rowden) sounded no alarm; did not call upon the public to interfere in the matter; did not order bell rung; saw no one there who showed the slightest inclination to help the prisoner or to interfere with the mob. Neither he or anyone else that he saw there made the slightest effort so far as he knew to go in and rescue the officers who were inside the jail.

(*Pr. Record*, 281-282.)

David R. Walker (colored), witness in behalf of the Government. The testimony of this witness does not touch or have any relevancy to the charges contained in the information, and relates principally to Thomas Taylor, who has been discharged.

(*Pr. Record*, 282-289.)

Julia Wofford (colored), says she was cooking for Capt. Shipp at the time of the lynching; that she heard Capt. Shipp one day at the dinner table say that if the execution would be stayed Ed Johnson would be mobbed. That at the time she heard Capt. Shipp make this remark at the dinner table Mr. and Mrs. Hardin and Mr. and Mrs. Myer and Mrs. Capt. Shipp were all present sitting at the table and heard the remark.

(*Pr. Record*, 294.)

She also says she told Mrs. J. B. F. Lowry of this conversation.

(*Pr. Record*, 292.)

This witness, Julia Wofford, is thoroughly and com-

pletely impeached, so much so as to render her testimony absolutely valueless by the following witnesses:

(W. A. Meyer, *Pr. Record*, 1015.)

(Mrs. W. A. Meyer, *Pr. Record*, 1016-17.)

(Mrs. Lille S. Hardin, *Pr. Record*, 1018-19.)

(Capt. J. F. Shipp, *Pr. Record*, 1105.)

J. T. Barnes, witness for Government, destroys his own testimony by his contradiction of himself, and shows that his statements cannot be relied upon. The newspaper article referred to by him is objected to and cannot be treated as evidence against anyone.

(*Pr. Record*, 340-348.)

He says while he expected a mob he can't give the name of anyone else who did, and that he did not report it to the police or anyone else and had nothing to base his expectation of a mob on.

Joseph R. Curtis, witness on behalf of the Government, went to the jail about 8:10 and when he got there didn't see anyone at all; went inside the office and started to the telephone. Two or three men came in in the meantime that he did not know. One of them asked him where he was going to telephone, and he said I better not or could not. He had a Winchester rifle in his hand, so I didn't go in.

(*Pr. Record*, 363.)

Capt. Shipp came in about 9 o'clock or a little after; did not see him until he was brought on the second floor. *Sev-*

eral members of the mob had him by that time and they brought him up to the second floor. He made a show of force, but was overpowered. He didn't fight them because there was too many of them. He resisted their efforts to hold him.

(*Pr. Record*, 366.)

The jail was full of men.

(*Pr. Record*, 367.)

The people there were in sympathy with the mob.

(*Pr. Record*, 371.)

T. S. Wilcox, witness on behalf of the United States, a plumber, chairman of the Board of Safety. This Board had control of the police. Public excitement had subsided. The lynching came as a great surprise to him. He was not looking for it nor expecting it.

(*Pr. Record*, 377.)

Wm. Walker, witness on behalf of the Government, says:

That he knew Capt. Shipp when he saw him, and that was the extent of his acquaintance with him. He came out electioneering. When he got to talking I told him I thought him running that negro out through Harriman to Nashville would cost him his election, or something like that. The negro at that time had not been lynched. *Shipp replied that after the negro fell into his hands he had to take care of him.*

(*Pr. Record*, 380-381.)

He (Walker) thought Johnson should be lynched and

he wanted to lynch him.

(*Pr. Record*, 383.)

Andy Ware, witness on behalf of the Government, says he did not believe the report when he first heard it, that the mob was attempting to lynch Johnson; that he was not expecting any lynching and the public was not expecting it. He was a Justice of the Peace at the time. Had an office on East Ninth Street, where great numbers of people congregated. He did not expect a lynching.

(*Pr. Record*, 397-398.)

Witness *did not communicate anything said by others to him. Did not believe it.*

(*Pr. Record*, 401.)

George B. David, witness on behalf of the Government, in answer to question by the Government, says "*He had not heard there would be a lynching.*"

(*Pr. Record*, 437.)

Joe Franklin, witness in behalf of the Government, says: "The usual guard at the jail, at nights, was just Mr. Gibson."

(*Pr. Record*, 444.)

The testimony of this witness applies principally to Bart. Justice, ———— Marquette, both of whom were discharged by the Court, and to Nick Nolan and Joe Clark; Joe Clark also discharged by the Court.

Witness Joe Franklin was, as the records show, indicted

for fraudulently obtaining money from Hamilton County. He admits his guilt by paying the money so charged to have been received by him.

(*Pr. Record*, 458-461-462.)

Then this witness not only impeaches himself and shows great prejudice in his testimony, but is impeached by other witnesses.

Dr. A. W. Boyd, witness for defendant, says he is acquainted with J. M. Stonecipher, witness for the Government; that he knows his general character; that it is bad; that he would not give him credit on his oath.

(*Pr. Record*, 500.)

Witness knows defendant J. F. Shipp and has for twenty years; are neighbors; his general reputation in every respect is good; he is a man on the side of law, peace and order.

(*Pr. Record*, 501.)

A. W. Boyd says *the excitement had absolutely abated before Johnson was lynched; that there was no thought in his mind of any danger to Johnson at the time he was lynched.*

(*Pr. Record*, 502.)

A. N. Sloan, witness for Alfred Handman, treasurer of the First Presbyterian church, has been Grand Master of the State of Tennessee; is well acquainted with defendant Shipp; has known him for years and years; knows his reputation; it is good. His reputation for peace and good order

and upholding law and order is good.

(*Pr. Record*, 560.)

Witness knew of the efforts put forth to protect Johnson by Shipp and his deputies.

(*Pr. Record*, 508.)

At the time the actual lynching took place the excitement had entirely subsided.

(*Pr. Record*, 508.)

He could not say that the effort to take his case up in the Federal court aroused excitement; it was more a sentiment of disgust. In answer to question by the Government's attorney, he says:

> "*As a reasonable man I knew of the Court proceedings, but I must say that I did not anticipate a lynching.*"

When asked "Did you not as a reasonable man think it would increase the excitement and revive the condition that had existed before under the circumstances?"

A. "*No;* I could hardly say that I did so."

(*Pr. Record*, 510.)

Henry P. Fry, witness for Bart Justice. This witness contradicts Joe Franklin as to his being at the court-house the night of the lynching by statement made by Franklin the next day to him (Fry.)

(*Pr. Record*, 553-554.)

Dr. Cooper Holtzclaw, witness in behalf of defendant Wm. Marquette, has known Capt. J. F. Shipp for twenty-

three years; knows the people with whom he associates, etc. He knows his general reputation in the community; it is excellent.

(*Pr. Record*, 571.)

Witness says it was not only the lawless element, but it was every element that wanted the—

Everybody else wanted a speedy execution of the case. He *did not consider that Johnson would be lynched on account of the delay.*

(*Pr. Record*, 574.)

Commencing on page 574 (*Pr. Record*) the testimony in reference to Wm. J. Mays is offered, ending page 595.

Testimony in behalf of Nick Nolan, commencing on 595 (*Pr. Record*), extending to 632.

Testimony on behalf of defendant Henry Padgett, commencing on 632 (*Pr. Record*), and ending on page 672.

Testimony on behalf of defendant Frank Ward, commencing on page 675 (*Pr. Record*), to 718.

Testimony in behalf of defendant Luther Williams, beginning on page 718 (*Pr. Record*), to page 750.

Testimony on behalf of defendant Frank Jones, beginning on page 750 (*Pr. Record.*) This witness in answer to the questions propounded by the Government:

> Q. "If you had known there had been a delay and you had known the Supreme Court had made an order that was going to delay the case, from what you knew of the lawless element in town at that time, would you not have been afraid there was going to

be an attempt to lynch him — if you had known about the order of the Supreme Court?"

A. *"No, sir; I would not take it that way. Everything was perfectly quiet."*

(*Pr. Record*, 757.)

Copy of record of criminal circuit court for Hamilton County in case of the State vs. Ed. Johnson, No. 23689, charge rape (*Record* 765-766.)

Witness Jones *never guarded the jail of Hamilton County after the conviction and removal of Ed. Johnson to Knoxville; never knew of anyone else who did, or of any necessity of so doing. The lynching was a very great surprise to him. He had not heard of any talk of lynching.*

(*Pr. Record*, 766-767.)

Azariah Shelton, witness on behalf of defendant Frank Jones, says: He is acquainted with defendant Frank Jones and has known him every since he was born; that they have never lived more than four miles apart; knows his general reputation; it is good; would give him full faith and credit on his oath.

(*Pr. Record*, 768-769.)

J. P. Webb, Justice of the Peace, says he knows Jones and his reputation is good and that he is entitled to full faith and credit on his oath.

H. D. Huffaker has held the position of County Superintendent of Schools and County Trustee. He says he knows Frank Jones; that his character is good; that he is entitled to full faith and credit on his oath.

Additional testimony on behalf of defendant Luther Williams:

Witness T. G. Newman says he has held the office of constable; knows Williams; that his general reputation is good and that he is entitled to full faith and credit on his oath.

(*Pr. Record*, 775.)

Robt. E. Pritchard, on behalf of Nolan.

(*Pr. Record*, 779.)

Oscar Yarnell, witness in behalf of George Brown. Mr. Yarnell is asked the following questions:

> Q. "Now, after the time that the attempt was made to lynch Johnson, I will ask you to state whether or not there was anything to your knowledge to indicate or to cause you or any other citizen with whom you mixed to suspect or believe, or if you had any information of any character whatever, that there was any danger of a lynching of Ed. Johnson?"
>
> A. "Well, Mr. Pritchard, *I never heard of any. I never heard of any threats to lynch him, and I did not regard the situation as at all dangerous.*"
>
> Q. "Did you know of any fact that would lead you to suspect or believe that he was about to be lynched?"
>
> A. "*No, sir; I did not. Public sentiment seemed to be quieted.*"

(*Pr. Record*, 787.)

Nothing had occurred to lead witness to suspect that a lynching might occur that night, nor was there anything in the public demeanor or public conduct, or public conversa-

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tion that informed him or would lead him to believe there was about to be a lynching.

(*Pr. Record*, 787.)

Dr. M. J. Lewis, witness on behalf of defendants, *didn't hear any talk or apprehension of mob violence on the day of the lynching, or anything about it at all, about that time. There was no apprehension of mob violence at that time. He knew of none anywhere at the time.*

(*Pr. Record*, 794.)

O. G. Stone, witness for defendants, says some time before the lynching of Johnson there was quite an excitement here. "*I guess it was a month before; but the excitement had died down at the time of the lynching.*" Did not think it would occur; heard no discussion of any impending mob or any apprehension of mob violence right before the occurrence. Did not hear any discussion on that day about the question at all. The publication of the order of the Supreme Court of the United States caused no apprehension on his part of a mob, nor had he heard anybody else talk about it within a few days before.

(*Pr. Record*, 802.)

Witness was at a meeting of the Lodge of Odd Fellows at the corner of Eighth and Market Streets. About fifty persons were present on the night the lynching took place. There was no discussion or any intimation of any lynching at that meeting.

(*Pr. Record*, 805.)

Charles W. Watson, witness for defendants, a member of the County Court of Hamilton and a Justice of the Peace, proves the good character of Marion Perkins, C. A. Baker and Matt Galloway and that they are entitled to full faith and credit on their oath.

(*Pr. Record*, 814-816-817.)

J. J. Bork, witness for defendants, proves the good character of Galloway and Perkins and that they are entitled to full faith and credit on their oath.

(*Pr. Record*, 818-819.)

R. A. Williams, witness for defendants, proves the good character of C. A. Baker and that he is entitled to full faith and credit on his oath.

(*Pr. Record*, 821.)

This witness also testifies as to the conduct of Capt. Shipp in his efforts to protect Johnson from lynching.

(*Pr. Record*, 822-823.)

George W. Edwards, witness on behalf of defendants, also proves the good character of Baker and that he is entitled to full faith and credit on his oath.

(*Pr. Record*, 825-826.)

David W. Lamon, a Justice of the Peace, witness for defendants, proves the good character of Marion Perkins.

(*Pr. Record*, 827-828.)

Marion Perkins, witness on behalf of defendants, never heard or knew anything during the time Johnson was here.

after he was brought back from Knoxville, for the ten days previous to the lynching, that would create in his mind an impression that Johnson was in danger or that any extra precaution ought to be taken for his safety.

(*Pr. Record*, 833-4.)

In his travels about the city he was brought in contact with the criminal class, as well as other element of society; that he never heard from the lawless element or any other element, any threats of lynching Ed. Johnson, or any talk that there was any such impression as that prevailing in the community previous to the lynching. The lynching of Johnson came to him as a very great surprise.

(*Pr. Record*, 834.)

M. N. Whittaker, witness on behalf of defendants, is attorney-general for the Sixth Judicial Circuit of Tennessee, which embraces Hamilton County and the City of Chattanooga; had been attorney-general five years. S. D. McReynolds was judge of the criminal court at the time Ed. Johnson was tried; heard a conversation between Capt. Shipp and the attorneys of Ed. Johnson. Capt. Shipp was very anxious, as well as the Judge and himself (Whittaker) that no mistake be made as to whether he was the man that committed the outrage, so he put opposing counsel in possession of all the facts he knew.

(*Pr. Record*, 841-2.)

Witness detailed the efforts on behalf of Capt. Shipp to

protect the negro and his success in doing so when first arrested and on up to the lynching.

(*Pr. Record*, 842-846.)

This witness did not observe any excitement either when Judge Clark stayed proceedings for ten days or when the appeal was granted, or first order by Judge Harlan was issued.

(*Pr. Record*, 847.)

There was nothing occurred in connection with said proceeding that, at that time, caused him or would have caused in his judgment, a reasonably prudent person to apprehend mob violence to Ed. Johnson, or that should have caused Capt. Shipp, the sheriff, or any other reasonable person to apprehend mob violence. He heard nothing or any suggestion of such a thing.

(*Pr. Record*, 847.)

This witness when asked if in his judgment the taking of jurisdiction by the Federal Court was a thing that would be liable to create a feeling or desire to mob the prisoner, or whether it would add to his security, said:

> A. "On account of the great respect of the people for the Federal Government, he would have thought that the action of the Supreme Court in this case would have guaranteed greater safety to the prisoner. That is my opinion."

(*Pr. Record*, 848.)

Witness says when he reached the jail the night of the lynching that Capt. Shipp had a gun in his hand, and Mr.

Gibson was so excited that the perspiration was rolling off of him in great beads; says that Capt. Shipp was excited and that he himself was excited when he saw what had happened. That when he reached the jail it would have been idle and silly to try to intercept that mob under the conditions that then prevailed.

(*Pr. Record*, 852-3.)

Witness has known Capt. Shipp for fifteen or twenty years; knows his general character; *it is just as good as any man's can be, and his character for peace and good order is perfect* and would give him full faith and credit on his oath.

(*Pr. Record*, 854.)

Ira M. Boswell, pastor of Walnut Street Christian Church, Chattanooga, and a member of the Pastors' Association or Union meeting; preaches about twice a week in the shops in Chattanooga.

(*Pr. Record*, 867.)

Witness says public sentiment against Johnson, which tended toward violence, subsided before the trial was over. He never dreamed there was anything like a lynching that would take place; no one else mentioned it; no reference was made to Ed. Johnson or to the trial in any way whatever.

(*Pr. Record*, 870.)

The people have more respect for the Federal Court than the State Court. Witness is acquainted with the general

character of Shipp and it is good and he is entitled to full faith and credit on his oath.

(*Pr. Record*, 870-71.)

Judge Clark, Judge of the United States District Court for the Middle and Eastern Districts of Tennessee, testified that he had lived in Chattanooga continuously from 1883. He heard Ed. Johnson's application for writ of *habeas corpus*, denied the same and granted the ten days' stay of execution. He was asked:

> Q. "*Judge, did anything occur at that time; was anything said at the trial on the part of the representatives of the State, or on the part of anyone, that caused you to apprehend any mob violence to this man?*"
>
> A. "*Not in the least.*"
>
> Q. "I will ask you after you returned to Chattanooga, *after Judge Harlan granted this order, and after the appeal was granted by the Supreme Court, if that order of the United States Supreme Court and of Judge Harlan caused you to apprehend any mob violence?*"
>
> A. "*No, sir; it did not.* I will tell you what did occur. On account of the decidedly emphatic charge in the petition and some statements that were made on the trial by certain witnesses to the effect that the attorneys for the defense had been to an extent intimidated in making the defense for fear the colored man would be lynched if they interposed the defense — this went mainly to the jury question and how it was made up — *I asked my secretary on the day that I was here, on Monday, on my way to St. Augustine, if he had heard of any suggestion*

or hint of any violence or dissatisfaction with the situation; and he told me he had not."

Q. "I will ask you, Judge, if you had apprehended danger to the man, or if application had been made to you, if you would not have ordered *his removal to some other jail?*"

A. "*If it had appeared that the prisoner was in real or great danger — if that had appeared to me — I am quite sure I would have made the order of my own motion.* I would have called up his attorney and suggested that he make the application for his removal. I am telling you now how I think I would have acted in such a situation as that."

Judge Clark says: "I never heard the remotest suggestion, and I did not think the man was in any danger."

(*Pr. Record*, 880-881.)

Judge Clark knows Capt. Shipp and his general character; it is good and he is entitled to full faith and credit on his oath.

(*Pr. Record*, 882.)

Robert Pritchard says that he was out on the street going his round about 5 o'clock; that up to that time he had not heard the subject of Judge Harlan's order or the action of the Supreme Court thereon mentioned.

(*Pr. Record*, 888-889.)

Judge S. D. McReynolds, Judge of the Sixth Judicial Circuit, State of Tennessee, examined, says:

Ed. Johnson was tried for rape before him; witnessed most of the attempted lynching the night after Ed. Johnson was arrested, January 23rd; tells what he witnessed at that

time and shows how the officers protected the prisoner.

(*Pr. Record*, 890-892.)

Witness tells of Capt. Shipp's removal of Johnson from the jail before the mob reached there; tells of the trial of Ed. Johnson and what attorneys he appointed to defend him.

(*Pr. Record*, 890-898.)

Witness tells of his and other's efforts to secure protection at the jail on the night the lynching occurred. When asked if there was anything that he could see that Capt. Shipp could do about helping in view of the conditions at that time, said:

> A. "*I have thought of it a good deal. Unless he had had some of his officers there, I do not see what good he could have done. I think it is an absurd idea to talk about summoning people to go there at that time after that mob.*"

Witness knows the general character of Capt. Shipp; it is splendid; would believe him on oath; his character for peace and good order is good.

(*Pr. Record*, 904.)

COPY OF CHARGE GIVEN GRAND JURY IN INVESTIGATING LYNCHING.

He says no indictments were found by the grand jury.

(*Pr. Record*, 907.)

Witness tells about the efforts made by Capt. Shipp to protect the prisoner.

(*Pr. Record*, 910.)

Rev. J. W. Bachman, the pastor of the First Presbyterian Church in Chattanooga, who has lived in Chattanooga and held that position for thirty-four years — the unquestioned head of the Chattanooga priesthood, and the most beloved citizen in Chattanooga — testified that his office was very near the jail; that he mixed and mingled with the citizenship of Chattanooga generally and with all classes of people; *he had taken great interest in the case and had been consulted, as an old citizen, by the sheriff and judge of the Criminal Court about protecting the prisoner and insuring him a fair trial.* His testimony shows that he kept up with the case and *was in a position to know the state of public feeling in Chattanooga.* He was asked:

> Q. "*Was there anything, in your judgment, knowing the public as you did, to cause a reasonably prudent officer to suspect that Johnson was in danger of being lynched at the time he was lynched?*"
>
> A. "*I would not think so at all. I had no thought of it, and I did not know of any man at the time that had any thought of it. It was a surprise to us all — a very great surprise.*"
>
> (*Pr. Record*, 921-926.)

It was the abhorrence of the crime that brought about the lynching.

(*Pr. Record*, 929.)

Witness has to do with all classes of people and mingles with them.

(*Pr. Record*, 936.)

Rev. Wm. C. Robertson, witness on behalf of defendants, pastor of Christ's Church, Chattanooga, Tenn., says there was a great deal of excitement at the time of the commission of the crime and arrest of Johnson. *This feeling and excitement died out completely after the trial and conviction of Johnson. The fact that the cause was taken up in the Federal Court did not revive the excitement or cause any talk of lynching, that he heard. He mixes with all classes. There was no excitement at the time the lynching occurred that he heard; heard no talk of lynching whatever; nothing occurred among the people that caused apprehension of lynching that he could see.*

(*Pr. Record*, 939-940.)

Witness says he is acquainted with the general reputation and character of Capt. Shipp; it is eminently good and he certainly would believe him on oath; his character for peace and good order is *very good.*

(*Pr. Record*, 942.)

Thomas H. Payne, a merchant doing business on Market Street, Chattanooga, has known Capt. Shipp for thirty years; knows his general character; it is good. He is entitled to full faith and credit on his oath; knows his character for peace and order; it is good.

(*Pr. Record*, 942-943.)

At the time and for some weeks previous to the lynching witness knows of no excitement at all personally; did not

hear anything to cause him to apprehend that a lynching was about to take place. His store is in the business part of the city, between Eighth and Ninth Streets; is much frequented; he heard nothing to indicate there was danger of lynching; did not know of any existence of feeling favorable to mob violence at that time.

(*Pr. Record*, 943-4.)

R. H. Parrent, witness for defendants, is a merchant in the paint and glass business. Trades largely with working men; his place of business is on Market Street, Chattanooga; lived near Capt. Shipp — next door; knows him well, and has for a number of years; knows the same people he knows and associates with the same people; knows his general character; it is good; his character for truth and veracity is good; his character for peace and quiet, peace and good order is perfect.

(*Pr. Record*, 946.)

On the night of the lynching he was living so close to Capt. Shipp that he could hear him talking over his phone. About nine o'clock that night he heard the 'phone bell ring and Capt. Shipp talking over the phone in an unusually loud tone—. Later on I heard him say, I will be there immediately. I heard him leave the house, slam the front door and go out in a hurried manner. It was something a little bit unusual, but at the time I did not think anything particular had caused the call for him. The unusual and excited man-

ner in which he left the house attracted witness' attention; heard of Johnson having been lynched the next morning when he got the newspaper. There was nothing that caused him to expect a lynching.

(*Pr. Record*, 948.)

Johnson and his case, so far as witness knew, had passed out of the public mind entirely.

(*Pr. Record*, 951.)

Had not heard it discussed in any way whatever for a long time. Was never more surprised in his life than he was next morning when he saw the paper notice of the lynching of this negro.

(*Pr. Record*, 952.)

Jas. A. Caldwell says he is a lawyer and has resided in Chattanooga forty years; knows Capt. Shipp; has known him twenty-four or thirty years; knows the people with whom he associates; his acquaintance is very general and so is witness'; knows his reputation, his character; it is good; knows his general character for truth and veracity; it is good; knows his general character for peace, quiet and good order, and it is good; was living in Chattanooga at the time of the arrest of Johnson and the attempt to lynch him, his trial and sentence and his final lynching. That after the trial of Johnson, February 9th, there was no excitement in regard to Johnson or the crime in the community. His opportunities for observing this matter were as good as those of the average citizen, and that at the time of the lynching

there was no cause to apprehend a lynching so far as he knew.

(*Pr. Record*, 954-955.)

J. D. Nicklin, witness for defendants, has lived in Chattanooga over forty years, and is a druggist. His store is on Market Street, in the principal business part of the city. His store is and has been for many years a very popular resort. He says everybody — people of all kinds — have been in there. It is called the Nicklin Club. Knows Capt. Shipp well and has for thirty years or more; knows his general character; it is of the very best; knows his general character for truth and veracity; would believe him under all circumstances and conditions. He has always been a truthful, law-abiding citizen. After the trial of Johnson the public excitement had subsided. There was no excitement at the time of the lynching.

(*Pr. Record*, 955-6.)

F. H. Dowler, agent for the Nashville, Chattanooga & St. Louis Railway in Chattanooga, has known the defendant Jerimiah Gibson for about twenty-five years; knows his general character; it is good, and he is entitled to full faith and credit on his oath.

(*Pr. Record*, 961.)

There was considerable excitement when Johnson was first arrested and up until his trial in the Court. *The excitement, from witness' observation, had subsided after he was convicted. He observed no public excitement or any evi-*

dence of public excitement from that time on to the time of his lynching, nor anything indicating that a lynching might be expected.

(*Pr. Record*, 962.)

P. A. Brawner, witness for defendants, resides in Chattanooga, and has since 1874; is engaged in the manufacturing business, "Ross-Meehan Foundry Company." It is situated on Carter Street, near Montgomery Avenue. There are many manufacturing establishments around this point. It is a district where most of the men who work in foundries, machine shops, etc., reside. His concern employs about 450 men. *At the time of the lynching all excitement had blown over.* There had been excitement prior to the trial of Johnson, but it had died out after his conviction. *Saw no excitement after the trial and conviction of Johnson. Has known Capt. Shipp about twenty years; knows his general character; it is good.*

(*Pr. Record*, 965-967.)

Charles Herron, witness for defendants, has lived in Chattanooga about eighteen years; came here from Cincinnati, Ohio; has known Capt. Shipp ever since witness came here; knows his general character; it is A-No. 1. I do not think there is any better in Chattanooga; would believe him on oath. His character for peace and good order has always been the very best. Witness is engaged in the foundry business; employs about 250 men; mingles with them, right among them; has mechanics, moulders, machinists,

draftsmen, etc., in his employ; remembers the circumstances of Ed. Johnson's alleged assault. There was a great deal of excitement and ill-feeling manifested toward him about the time the crime was committed and he was arrested; remembers the circumstances of his trial. After the trial and conviction the excitement blew over. *Up to the morning of the night of the lynching he saw nothing from which he apprehended mob violence at that time; was not in the city during the day.*

(*Pr. Record*, 972-3.)

Witness says that from his knowledge or acquaintance with the people in Chattanooga that, *the fact of the Federal Court having taken jurisdiction lessened the danger, and considered it was a safeguard to the prisoner; that they would not dare to do anything against the United States Government.*

(*Pr. Record*, 974-5.)

Wm. E. Love, witness for defendants, moved from Chicago to Chattanooga in 1887 and has lived here ever since. He is in the manufacturing business — stoves, castings and cornice work, with the Mountain City Stove Manufacturing Co.; also has a store on Market Street; employs from seventy-five to eighty-five men and sometimes more; came in personal contact with the men.

Witness has known Capt. Shipp since 1887; knows his general character; it is good; would believe him on oath. His character for peace and good order is good. *There was*

a great deal of excitement at the time Johnson was first arrested. The public generally took a great interest in the matter. This excitement died out after he was convicted. The matter was not being discussed so far as he knew at the time the lynching actually took place; heard no comment at all on the subject, either on the day or night the lynching occurred; considered the fact that the Federal Government had granted an appeal to Johnson would render his condition more safe, as generally parties that do mob are more afraid of the United States Court than they are the local courts.

(*Pr. Record*, 975-979.)

Dr. P. D. Sims, witness for defendants, has lived in Chattanooga fifty-one years, practicing medicine; has mixed with the people of Chattanooga fifty-one years; still practices his profession; was for fifteen years member of the Board of Health; is now city physician. His office is in less than one block of the county jail; has been there fifteen years. At the time of the actual lynching he neither heard or saw manifested in any way any mob spirit or disposition to lynch Johnson. Witness did not go to Capt. Shipp at this time because it did not occur to him that there was danger, but had on previous occasion been in consultation with him and conferred with him, making suggestions in which Capt. Shipp always entered heartily in taking active measures for the protection of his prisoner.

(*Pr. Record*, 980-981.)

Witness knows Capt. Shipp's general character. It is good, without a blemish. His general character for peace, prodity, quiet and good order is absolutely good. His veracity is unimpeachable.

(*Pr. Record*, 982.)

Samuel T. Dewees, witness in behalf of the defendants, is engaged in the mercantile business on Market Street, Chattanooga. Has known Capt. Shipp ever since he has been here, and knows his general character. It is very good; would believe him on oath. Knows his general character for peace and good order; it is good. Remembers the circumstances of Ed. Johnson being arrested and charged with the rape of a white girl. Remembers there was a good deal of excitement and bitter feeling soon after his arrest and on up until the trial, and talk of mob violence. *It subsided to a very great extent after his conviction, and from that time up to the day Johnson was lynched at night he had not heard of any excitement or threats of lynching. Did not hear the subject mentioned by anyone on that day.*

(*Pr. Record*, 981-990.)

All classes of citizens want rapists brought to justice. *He was not surprised at the attempt to lynch him the first time, but was surprised and was not expecting a lynching at the time it occurred.*

(*Pr. Record*, 994.)

The abhorrence of the crime still continued, does yet and always will.

(*Pr. Record*, 995.)

Judge C. D. Clark, witness for defendants, is acquainted with the defendant Jerry Gibson and *has known him ever since* 1883; *is acquainted with his character. It is good; would give him full faith on his oath in a court of justice.*

(*Pr. Record*, 997-8.)

J. H. Cantrell, a lawyer practicing in Chattanooga and has been for twenty years. His office is in Miller building, corner of Seventh and Market Streets, about two squares and a half from the jail. He thinks there were on an average of about 300 people attending the Johnson trial at Chattanooga. The day after the trial was concluded a conference was held in his office. He was one of the committee appointed to go over the case with Jud. Shepherd, Mr. Thomas and Mr. Cameron, the attorneys for Johnson.

(*Pr. Record*, 998-9.)

Messrs. Thomas and Shepherd both stated in the conference to us that they had gone over the evidence in the trial of the case of Johnson carefully and that so far as they were able to see there was no reversible error in the record and they knew of no error in the admission of evidence or charge of the court, and that the Supreme Court of Tennessee would not be justified in reversing the case on the ground of want of sufficient evidence to sustain the verdict, and that an appeal would only mean delay.

(*Pr. Record*, 1000-1001.)

Witness *saw no indication of a disposition to lynch John-*

son after he was sentenced by Judge McReynolds; was up that night until about ten o'clock; knew nothing of the lynching until the next morning.

(*Pr. Record*, 1005.)

Houston Gibson, witness for defendant Jerry Gibson. Witness is a son of defendant Jerry Gibson and is fifteen years of age. Remembers the lynching of Ed. Johnson for rape; went with his father the evening of the lynching to the jail. They left home about 5:30 p. m. The jail is about two miles and a half from his father's residence. They drove a horse and buggy; saw Jailor Brown on reaching the jail; he was day jailor; handed the keys of the jail to his father over the fence. His father went into the jail while he went to put up the horse in a stable behind the jail; went back to the jail; was with his father. There was no one in there except his father and himself. He went the rounds with his father; remembers the woman that was in the hospital cell; don't know her name. Witness went to the hospital cell and his father went down stairs and went the rounds down there. He talked with the woman. Ellen Baker was in the hospital cell while I was talking to her. I was on the outside. She was locked up; stayed at the jail with his father until about 8:30 in the evening, then went to the theatre; came back to the jail after the show was over; found that the jail doors were broken down and that they had got Ed. Johnson out and lynched him; that is why I

know I talked to Ellen Baker that night.

(*Pr. Record*, 1006-9.)

W. A. Meyer, on behalf of defendants, is a son-in-law of Capt. Shipp; resides on Lookout Mountain in summer and boards at Capt. Shipp's in winter; was boarding at Capt. Shipp's last March a year ago (that is from date of his deposition.) He and Sam Hardin are brothers-in-law, having married sisters, daughters of Capt. Shipp. Witness' wife's name is Carrie and Hardin's wife's name is Lillie. He knows the negro girl, whose name is Julia Wofford. He and his wife and Hardin and wife and Capt. and Mrs. Shipp were often at the dining-table at meals together; never heard Capt. Shipp make a remark that if there was a stay of proceedings in relation to Ed. Johnson he would be lynched, or any remark in substance if an appeal was granted Ed. Johnson would be lynched or mobbed, nor did he hear Capt. Shipp make such remark at any other time, at his residence or anywhere else. He was boarding at Capt. Shipp's the week after Ed. Johnson had a hearing before Judge Clark. No such conversation or anything like the remark of Julia Wofford occurred at that week or at any other time.

(*Pr. Record*, 1014-1015.)

Mrs. W. A. Meyer. Her testimony corroborates that of her husband and contradicts the statement of Julia Wofford.

(*Pr. Record*, 1016-1017.)

Mrs. Lillie S. Hardin, daughter of Capt. Shipp, also con-

tradicts the statements made by Julia Wofford as to the remark of Capt. Shipp and corroborates the statement of W. A. Meyer and wife and shows that Julia Wofford's statements are not true and therefore cannot be believed, according to the rules of evidence.

(*Pr. Record*, 1018-1019.)

Jerimiah Gibson, witness on behalf of defendants, was born in North Carolina; came to Tennessee in 1867; was a soldier in the Confederate army; was during the months of February and March, 1906, night jailor at the jail in Hamilton County, Tennessee, under Capt. Shipp, sheriff; has six children, only two living with him. His son Houston has been examined in this case; remembers the night of the lynching; his son came with him the night of the lynching to the jail; came in a buggy; saw George Brown, the day jailor, when he got to the jail; had no conversation with him; he just handed me keys; when I got the keys I went inside the jail office; my son went to put the horse up; was gone from twenty to thirty minutes; came back in about twenty or thirty minutes. *The first thing I did after I got to the jail was to go around and see that the jail doors were all closed and locked; my son went with me, he going up the steps and I going down; I went all around and inspected the jail. There was no chains on the jail doors that night that I noticed;* would have seen them if they were there. He could not have gone in if chains had been on the doors. There

were only two persons on the floor that Ed. Johnson was on that night, a woman prisoner and Ed. Johnson. The woman's name was Baker, the same who has testified in this case; the other cell on that floor was not used and was standing open; Ellen Baker was locked up in her cell. I got to the jail about 6:15 or 6:20 in the evening. My son Houston stayed at the jail until about 8:25 or 8:30; he went to the Opera House; don't remember a single person there with him that evening. *He knows Joe Franklin, who has testified in this case. He did not bring a prisoner there at 7 o'clock or at all that night; did not see him that night.* There were no deputies there taking supper and drinking beer that night; was upstairs opposite the Baker woman's cell when the mob came on the fourth floor; the front door of the jail was closed when they came; I had locked it; the Baker woman when I went up wanted some water or medicine and I had to draw some water from the bath room and hand it to her. *The first witness knew or heard of the mob was when he heard someone say: "We are going to have that damned negro."* He then stepped over into the hospital cell. I knew if I went downstairs they would kill me or take the keys, and *thought I had better protect the jail by staying inside and keeping the keys.* Just in an instant after I heard this remark they begun hammering the door; they broke it in; when they broke down the door they came rushing upstairs — a crowd of them — and begun pounding on

Ed. Johnson's cell; they had not discovered me up till this time; then, in a few minutes they began calling for the jailor to know where he was; they wanted the keys and they came in the room where I was and stayed with me, they first getting the keys. They wanted to know what I was hiding for; said I was trying to protect the negro; they pulled me around considerably; *they got the keys from me, I suppose in five or ten minutes; they took them by force; they disarmed me; took my pistol; surrounded me and disarmed me.*

(*Pr. Record*, 1019-1026.)

"After they had disarmed me and taken my pistol they had three men to stay with me and guard me and kept me until Ed. Johnson was taken away from the jail; these men were armed; they had pistols; they took me downstairs or anywhere they wanted to go; they took me over first and wanted me to unlock the door to Johnson's cell, and I told them I could not do it because they had broken the lock; after they had taken the keys they tried to unlock the door and could not do it; they had broken the lock; said I was lying when I said I could not unlock the door and that those were not the keys that I had given them; that there was another set of keys; there was no other set of keys; *they kept me guarded all the time after they came.*"

(*Pr. Record*, 1026-27-28.)

"Had no conversation with Capt. Brown when I got to the jail or before he left that night. Capt. Brown did not state to me they were expecting a mob that night. I fix the time the mob arrived by knowing that I go around and turn the lights out at 9 o'clock; that I had not turned out the lights when the mob came; they came before I turned out the

lights; was on the fourth floor — Ed. Johnson's floor — when they came; stairways are all inside of the hall; it did not require them over ten minutes to break in the front door; couldn't give warning of the situation; the reason I did not make resistance to the mob was that from the amount of noise and the guns they were using I thought that I would be killed instantly if I did so."

On cross-examination witness says Capt. Brown did not state to him they were expecting a mob that night.

(*Pr. Record*, 1033.)

Witness was overpowered is his reason for not resisting, as he thought he would be killed instantly if he did so.

(*Pr. Record*, 1042.)

Witness Jerry Gibson, being re-called, denies the statement handed him, purporting to have been made by him, by the attorney for the Government.

(*Pr. Record*, 1056.)

He did not make that statement to the men.

(*Pr. Record*, 1056-7.)

Did not tell them he knew the members of the mob, or a great many of them.

(*Pr. Record*, 1057.)

Will Burke, a policeman for twelve years; was on the force the night of the lynching of Ed. Johnson. His beat on the night of the lynching ran from Market to A street, Eighth and Ninth, from Market to A, and from Eighth to Ninth on Market, Cherry and Georgia Avenue; considered the most important beat in the City; heard of the lynching

something after 10 o'clock at Eighth and Market Street; heard it from a motorman; the car had no bell or rope; the ropes had been taken by the mob to lynch the negro. Five or six minutes after he got this information he saw Mr. Galloway, Mr. Baker and Fred Frawley running across Market Street in the direction of the jail. "I told them it was too late, the negro was already dead."

(*Pr. Record*, 1058-60.)

The officers, Galloway and others, were running in a trot; saw no indication whatever of any mob or crowd on his beat; his beat went to *The Times* office on Georgia Avenue; the town was quiet. When he saw these men, Galloway and others, and told them it was too late, the negro was dead, they made no halt and did not answer.

(*Pr. Record*, 1058-1060.)

Witness says the lynching was a complete surprise to him.

(*Pr. Record*, 1060.)

Matt Galloway, witness for defendants, is a married man; was the criminal court deputy under Shipp; had been ever since witness was an officer under Shipp; served criminal papers; had nothing to do with the jail only when there to guard at night and three or four days during Johnson's trial; that was the only time he had anything to do with the jail; it was no part of his business to exercise any supervision over the jail as a guard or protect its prisoners. After Johnson was convicted had not been at the jail as a guard, at any

time after Johnson was brought back from Knoxville, 10th or 11th of March.

(*Pr. Record*, 1062.)

Witness had heard no threats of lynching or of any disturbance on the day or night of the lynching. He was at the Eagle Club rooms the night Johnson was lynched; belongs to the Masons, Odd Fellows, Rebekahs, Knights of Pythias, Fraternal Censer, Junior Order and the Iron Moulders' Union; got information they were lynching Johnson and went immediately to the jail; when witness got to the jail he met Capt. Shipp coming outside the door. He ascertained that they had gone with the prisoner. Capt. Shipp asked him to go to the bridge; he went; before starting he got a gun and a pistol; he wanted a Winchester rifle; he got it and filled up the magazine; didn't see any guns except those he and Baker had; was not at the jail the night of the lynching with Frawley and others, as stated by Walker; he had not agreed to allow Johnson to be lynched with the lynchers or anyone else; had not combined or confederated with anybody in regard thereto; knew nothing of anyone having ary intention to lynch him.

(*Pr. Record*, 1063-1068.)

This witness tells what occurred at the jail on the night when the first attempt was made to lynch Johnson, and of Capt. Shipp's efforts to protect him by removing him from the jail before the mob had organized. No one expected

the mob on the night the lynching occurred.

C. A. Baker, deputy sheriff under Capt. Shipp; had been deputy since Shipp was first elected; tells of what he did in assisting Capt. Shipp in the removal of Johnson before the first mob attacked the jail.

(*Pr. Record*, 1077-78.)

Witness was at the Eagle Hall on the night of the lynching; had no communication, no suggestion or hint that day or that night that Johnson was likely to be lynched; had no communication with Capt. Shipp or any of his deputies in relation thereto, nor any understanding with any of the supposed lynchers or mob; he heard nothing that day or night that there was likely to be or probably would be a lynching of Johnson; nothing occurred to arouse his suspicion that there might be such a thing; had no suspicion of any such action; he was playing a game of cards at the Eagle Club with Mr. Frawley, Jim Elliott and Matt Galloway; don't remember just what time they left the Eagle Club; someone brought information that there was a mob at the jail or something to that effect; got up and left immediately for the jail; Matt Galloway and Fred Frawley went with me; remembers Mr. Burke hollered something as they passed on the street; he was a policeman; don't remember what he said; when he reached the jail he found they had gone with Johnson; saw Capt. Shipp at the jail, the only person I now remember of seeing; he told us to go to the bridge as soon as

we could, Mr. Galloway and myself; we did it as quick as we could get guns; found Johnson dead when we got there; didn't see any who had executed Johnson or that he knew had taken part in it; we did not stay there a great while; came back to the jail; witness would have defended the jail and the prisoner; *they had not been guarding the jail at night after Johnson was convicted.*

(*Pr. Record*, 1079-80.)

They did not keep up any guard after Johnson was brought back from Knoxville; heard no manifestation of a desire to mob him anywhere that day, nor did he hear or see, or know anything that affected his safety or indicated danger to him while in jail after he was returned from Knoxville.

(*Pr. Record*, 1081.)

M. J. Horan, witness for defendants, walked up to the jail on the night of the lynching and

> "saw Capt. Shipp, and he was very much excited. In fact, he was *almost in a faint.* He was as white as a sheet. I walked up to him, and he just put his hand on my shoulder and said, 'My God, they have ruined me.' I told Sheriff Shipp to sit down, and he started to sit down. Then he jumped up and said, 'My God, I did everything I could.' I said, 'I know that, Sheriff.' I said, 'You are not to blame, you have done everything you could have done.' I said, 'No one expected this.' He said, 'My God, no.' I told him to sit down again. I asked him if I could get him a drink, and he shook his head and said 'No.' I asked him if he thought he was going to faint, with his head hanging over, and I walked out to see if I could get him a drink of water. I did

not see any and I came back and resumed my conversation with him. *I told him no one in the world knew anything about it. He said, 'My God, I did not.' I told him no one did.* I told him I was down in the street right there at the jail before I heard or saw anything."

"In a short while after the mob left the jail, Deputies Galloway and Baker arrived at the jail. They had been with a party of friends playing cards at the Eagles Club when notified that the mob was at the jail. They ran from the club room to the jail, but arrived after the mob had left. Capt. Shipp told them to go at once to the bridge where the mob had the prisoner. This, they did."

(*Pr. Record*, 1085-87-89.)

J. S. Bell, foreman of the grand jury impanelled to inquire into the lnyching of Ed. Johnson, that is, the jury that was directed under the charge of the criminal Court Judge to investigate and return true bills against anyone found that had been a member of the mob that had lynched Johnson. The Judge gave them a special charge in relation to this lynching. The jury got no evidence, or at least not sufficient evidence to find an indictment against anyone.

(*Pr. Record*, 1090-92.)

John Brown Cameron, witness for defendants, remembers the circumstances of the lynching of Ed. Johnson in March, 1906; is acquainted with *Jerry Gibson, who was night jailor at the time; went to see Jerry Gibson on Sunday night before the lynching, on Monday night between 7 and 7:30 o'clock; there were no other guards at the jail except Gibson on that night.*

(*Pr. Record*, 1093.)

Capt. J. F. Shipp, witness on behalf of defendants, says: He was the Sheriff of Hamilton County when testifying and also on the night of March 19, 1906. That Ed. Johnson was arrested by one of his deputies on the 25th of January, 1906, of which he was notified and went at once to the point where he learned the arrest had been made. Carried Johnson in his buggy to the jail by a circuitous route. There was a great deal of excitement at that time which grew out of the crime that had been committed on the night of the 23rd.

(*Pr. Record*, 1094.)

This defendant and witness then tells what efforts he made to protect and prevent the mobbing of Johnson, which is found on pages 1095-1100, *Pr. Record.*

He then tells of the indictment and trial of Ed. Johnson.

(*Pr. Record*, 1100-1102.)

The guards that had been kept at the jail were removed on the 9th of February; Johnson and other prisoners having been carried to Knoxville. He had no guards after that date except at one time when a negro by the name of Wilson had been arrested charged with murder and only then for two or three days, that is, no guards after Johnson was convicted and carried to Knoxville, with the exception above stated, until the lynching took place.

(*Pr. Record*, 1103-1104.)

Johnson was brought back from Knoxville on the 10th of March, 1906. There was no excitement when he returned

with the prisoner. There was no excitement or anything that he discovered that could put a prudent and careful man on his guard or any notice that there would be an attempt to lynch Johnson on the night he was lynched. "I never conspired with any living man, my deputies or anyone else; and I had no knowledge, not the slightest, that there would be any effort upon the part of anybody to interfere with Johnson."

Witness is asked:

> "State whether or no if you had suspected, or if you had seen or realized that there was going to be any effort or any attempt at mobbing the prisoner what course would you have pursued for his protection?"
>
> A. *"I should have certainly done as I had done before, endeavored to protect him."*

When asked in his opinion the granting of the order, allowing appeal, by the Honorable Court had anything to do with causing or bringing about the lynching of Johnson, he said:

> A. *"I do not know what was in the minds of the people who did the lynching. I know that it had not occurred to me that anybody would interfere with the order of the United States Supreme Court."*
>
> Q. "I will ask you to state whether or no you have always, and did at that time, regard and hold the Supreme Court and its authority as of the highest and entitled to the greatest respect, and whether you intended in any way to hold its action in contempt?"

A. *"I certainly had not done anything to bring myself into contempt of the Supreme Court, and had always held the Court in the highest respect."*

Q. "State whether or not it has always been your purpose to uphold and maintain law and order as a good citizen?"

A. *"Yes, sir; I am opposed to mob violence. I am in favor of upholding the law as the best security for the public."*

(*Pr. Record*, 1104-1105.)

Witness tells of how he first heard of there being some commotion at the jail and advice to him to go down and see about it. Says when he reached the jail he entered rapidly and just as he reached the inside of the door he saw *Mr. Gibson sitting back against the wall with three or four men standing around him. Witness started over to make some inquiry of him and just as he did so he was seized from behind by several men; when seized he did not know but what they were going to do him some violence and he reached for his gun.* They rushed him upstairs and carried him into the hallway, where he was kept prisoner during the time they were getting the prisoner. He was kept a prisoner until they had left the jail with Ed. Johnson.

(*Pr. Record*, 1106.)

On page 1107 (*Pr. Record*) witness tells of the fraternal orders to which he belongs and of the different positions he has held in them.

On page 1109 (*Pr. Record*) the defendant Shipp is

asked by the attorney for the Government if he had read in *The Chattanooga Times* the morning after Johnson had been sentenced W. G. M. Thomas' statement, and witness says he does not remember, but in answer to another question he says he thinks he read it. The introduction of this article as evidence was objected to because it was incompetent, irrelevant and had nothing to do with this case at bar; being merely a newspaper statement it could not be made evidence in this cause. This article of Thomas' will be found on page 1109 to 1111 (*Pr. Record*), and certainly cannot be under the rules of law treated as evidence.

All statements in the record of what was said by the attorneys representing Johnson or those appointed to confer with them by the Court, were objected to by defendants, and the objections should have been sustained — as also should the objections to the introduction of the Thomas statement, and all other newspaper statements have been sustained and said communications, statements, etc., excluded as evidence. Witness, when asked if he saw Chivington, said he did; that he did not speak to him. He (Chivington) was not restrained. He did not call for a posse to relieve him or help the prisoner because he did not think it was —— (here the Government attorney interrupts.) Witness finishes: "I did not think there was anybody there that would respond to the call if they had been called upon." He remonstrated with the mob and asked them to leave the man

alone and let the law take its course. It did not occur to him, when notified that there was something going on at the jail, to go somewhere else and summon help before he knew what the trouble was.

(*Pr. Record*, 1121.)

A man's hindsights are a great deal better than his foresight —(meaning that it was much easier to see things that might have been done after the act had been committed than before.) He regarded everyone there around the jail as a part of the mob. No one offered any help or suggested they would render any assistance. In fact, I was under arrest myself at the time I reached the inside of the jail; no one offered to come to my assistance; had no opportunity to summons anyone to my assistance.

(*Pr. Record*, 1122-3-4.)

He was carried upstairs and kept in confinement during the time the mob was there and until they had taken Johnson from the jail.

(*Pr. Record*, 1125-6.)

W. T. Center, witness for defendants, knows Ellen Baker; knows her general character; it is very bad; from that general character he would not give her credit on her oath. She is in what he would term the whorish business.

(*Pr. Record*, 1127-28.)

She was also engaged in selling moonshine liquor.

(*Pr. Record*, 1129.)

J. H. Stuart, witness for defendants, testifies to about the same thing in regard to Ellen Baker as does W. T. Center.

(*Pr. Record*, 1130-33.)

The testimony of Mrs. J. H. Springfield, page 1133 to 1146 (*Pr. Record*), has reference alone to Padgett Stonecipher, as has also the testimony of Chas. Smith, A. J. Cox and Claud Springfield.

(*Pr. Record*, 1146 to 1160.)

ARGUMENT.

May it Please the Honorable Court:

I.

The first question we will discuss is that raised under the information:

"*Were Sheriff Shipp and his deputies informed, and did they have every reason to believe, that an attempt would be made, on the evening of March 19th, or early in the morning of the 20th, by a mob composed of a large number of armed men, to force an entrance into the county jail for the purpose of taking Johnson therefrom and lynching him?*"

Defendant, Sheriff Shipp, and each of his deputies, deny that they were informed or had any reason to believe from current reports or rumors conveyed to them, or from any other circumstance, that an attempt would be made on the

evening of the 19th or early in the morning of the 20th by a mob, composed of a large number of armed men, or otherwise, to force an entrance into the county jail for the purpose of taking Johnson therefrom and lynching him; or that the sheriff withdrew from the jail early in the evening of the 19th the usual and customary guard. It is true that Jerry Gibson was the customary guard at night and he was left in charge of the jail as usual on that night. They also deny that they committed other acts or did other things evincing a disposition on the part of said Sheriff and deputies to render it less difficult or dangerous for the mob to prosecute and carry into effect its unlawful design and purpose of lynching Johnson.

This, as we insist for defendant Shipp and Gibson, is the first and one of the material issues presented and to be tried in this cause. The burden of proof to establish the allegations contained in the information is upon the Government, and we respectfully but earnestly insist that the proof in this record fails to sustain the foregoing charges contained in the information; that it not only fails to do so, but it actually disproves said charges, as is seen from a collation of the testimony, as hereinbefore set out.

It will be noted by reference to the testimony, as hereinbefore set out, that the witnesses for the Government, as well as those on behalf of the defendants, establishes beyond controversy that there was no excitement or anything in the con-

duct of the people on that day or evening up to the time the mob reached the jail that indicated or would have indicated to a reasonably prudent *officer* that Johnson was in danger of being lynched on the night he was lynched. This is shown by the testimony of L. G. Walker, John L. Chivington, Joseph R. Curtis, T. S. Wilcox, Andy Ware, George B. David, all witnesses for the Government, contradicting the allegation contained in the information in reference to the officers having the information of mob as charged; as do also the following witnesses on behalf of defendants: Dr. A. W. Boyd, A. N. Sloan, Dr. Cooper Holtzclaw, Jas. P. Pemberton, Robt. E. Pritchard, Oscar Yarnell, Dr. M. J. Lewis, O. G. Stone, E. B. Herron, J. J. Bork, Marion Perkins, Attorney-General M. N. Whittaker, Rev. Ira M. Baswell, Hon. C. D. Clark, Hon. S. D. McReynolds, Rev. J. W. Bachman, Rev. Wm. C. Robertson, Thomas H. Payne, R. H. Parrent, James A. Caldwell, John B. Nicklin, Pembroke A. Brawner, Chas. Herron, Wm. E. Love, Dr. P. D. Sims, Samuel T. Dewees, John H. Cantrell, Jeremiah Gibson, Matt Galloway, C. A. Baker, M. J. Horan, J. S. Bell, John B. Cameron, and Capt. Joseph F. Shipp. These witnesses, on behalf of defendant, also contradict and disprove the charge contained in the information that defendant Shipp, Sheriff of Hamilton County, withdrew the usual guard from the jail on the day or evening of the lynching to make it more easy for the mob to carry out

its purposes. The proof, as we respectfully insist, not only refuting this charge, but establishing beyond question that the charge is untrue and has no foundation upon which to rest.

II.

We respectfully insist that the Government has also failed to sustain by proof the charge contained in the information that the defendant Joseph F. Shipp, and the other defendants named, did willfully, unlawfully, combine, and conspire, and confederate together for the purposes alleged. In fact, as we insist, there is not one particle of evidence in this immense record going to sustain this charge in any particular, but on the contrary the proof of these various parties disproves the charge, and certainly no judgment can be based upon this allegation in the information.

Therefore, we respectfully insist for the defendants Shipp and Gibson that the finding of the Court holding them guilty of contempt under the allegations contained in the information, is contrary to the great weight of the testimony on the issues in this cause, and that for these reasons a new trial should be granted your defendants, or the former finding and judgment of the Honorable Court should be reviewed and reversed and the charges dismissed as against these defendants.

We respectfully but most earnestly insist that the Honorable Court, in the majority opinion, erred "in admitting as

evidence the various newspaper articles, the purported interview of defendant Shipp, as published in the newspaper, and the article of W. G. M. Thomas over the objections made to their introduction when offered, which objection set out the grounds of objection"; as we understand the opinion of the majority of the Court is largely based upon various newspaper articles, ex parte statements published in the newspapers, and with which defendant had nothing to do, with the exception of the interview published in *The Birmingham Age-Herald*. We respectfully insist that the published statement of the interview is incompetent and irrelevant, because the reporter Evans was examined as a witness on behalf of the Government and in his testimony he detailed the interview; not only that, but he shows that the published article was not written at the time the interview took place, but afterwards from memory.

When we compare the interview as published in *The Birmingham Age-Herald* with the testimony or evidence of the reporter himself, as to this interview and as to what Capt. Shipp actually said, we see that Capt. Shipp's statement as testified to by the witness is as follows:

> A. "*Well, he said that the people of Chattanooga were perfectly willing to let the law take its course and always had been, but that delay —*"
>
> Q. "*What delay?*"
>
> A. "*The delay in letting the law take its course, I suppose.*"

Q. *"In what way? In any particular Court?"*

A. *"I should judge from what he said in all Courts."*

Q. *"Delay in letting the law take its course had done what?"*

A. *"Was perhaps really at the bottom of the lynching."*

(*Pr. Record*, 266.)

So it will be seen that the published interview is very different from the evidence of Capt. Shipp's statement as detailed by the witness (the reporter himself.) It is seen from the published statement that the reporter come to draw upon his imagination in writing a sensational article clothed it in garments of his own fancy and entirely distorting the actual statement of the witness.

We, therefore, respectfully insist that this published statement cannot be looked to as evidence in the cause, as this interview is not made an issue in the information.

Take for instance, the Thomas article: it was written some time before the lynching of Johnson, immediately after his trial and conviction. With this the defendants had nothing to do, and said communication is certainly incompetent and irrelevant as against these defendants.

It is a rule of law that in criminal cases it is guaranteed by the Constitution of the United States that every person accused of a crime shall be confronted by the witness face to face; and the admission of these articles and publications and

making them testimony over the objections of the defendants, we respectfully but most earnestly insist, is contrary to the rule of evidence in criminal cases and the guaranty of the Constitution.

(*U. S. Constitution, Amendm. Art.* 6.)

(*U. S. vs. Angell*, 11 *Fed.*, 34.)

Defendants had no opportunity to cross-examine the party writing these articles and were thus deprived of the guarantee of the Constitution. We deem it unnecessary to refer to authorities to sustain this proposition.

It is also a general rule "that it will be presumed that public officers have qualified, that their official acts are properly performed and everything in connection with the official act was legally done, whether prior to the act, as giving notice, serving process *or determining the existence of conditions prescribed as a prerequisite to legal action, or subsequent to such act.*"

(16*th Cyc.*, 1078-9.)

It is, moreover, a rule of procedure that the burden of proving unlawful or irregular conduct rests upon him to who asserts it, since there is no presumption of official irregularity.

(16*th Cyc.*, 1078.)

(*Knox County vs. New York Ninth National Bank*, 147 *U. S.*, 91.)

(*Keyser vs. Hitz*, 133 *U. S.*, 138.)

(*Callahan vs. Meyer*, 138 *U. S.*, 617.)

Among the officers in favor of whose acts a presumption of regularity has been extended are sheriffs and numerous other officials.

(16*th Cyc.*, 1078.)

(*United States vs. Pugh*, 99*th U. S. Rep.*, 271.)

(*Xenniea First National Bank vs. Stuart*, 114 *U. S.*, 224.)

(*U. S. vs. Ross*, 92 *U. S.*, 28.)

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine and imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

(*Revised Statutes of the U. S., Sec.* 725, *p.* 137.)

It is clear from the record in this cause that the charges of contempt did not occur in the presence of this Honorable Court, or so near thereto as to obstruct the administration of justice, that it was not the misbehavior of an officer of the Honorable Court, or a party or witness, and we insist it is clearly shown from the proof that these defendants in no way interfered, or attempted to do so, or intended to in any way interfere with the process of this Honorable Court, or

to commit any contempt of its order, as is shown by the proof in this record.

We insist that a contempt is a question of intent and that defendants having not only purged themselves by their answers, but also by their proof, and having, as hereinbefore shown, disproven each of the charges as contained in the information, and shown that they are not guilty. We, therefore, respectfully but earnestly insist that the court should either grant a rehearing of the case or reverse its former holding, that is the holding of the majority of the court, and discharge these defendants, as the evidence in the case disproves the charges contained in the information *in toto*.

We further insist that this Honorable Court erred in assuming jurisdiction of this case, as defendant Johnson was not in the custody or control of the Federal Court, but a State prisoner.

It is well settled that the Court having possession of a prisoner cannot be deprived of the right to deal with him until its jurisdiction is exhausted. No other Court has a right to interfere with his custody. The State Courts not having exhausted their jurisdiction and there being no Federal question raised during the trial of the cause that would give the United States Court jurisdiction, without which this Honorable Court could not have jurisdiction, without which any order or decree it might make would be void.

(*Ex parte Johnson*, 167 *U. S.*, 120.)

In *Leper vs. Texas* this Honorable Court, Mr. Chief Justice Fuller delivering an opinion of the Court, said:

> "To give this court jurisdiction *it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way.*"

Referring to other decisions of this Honorable Court:

. So far as the record in this cause shows, no right, privilege, immunity in respect to these matters was set up or claimed by defendant Johnson, as required by Section 709 R. S., and such we insist is true of this case at bar, without which this court could have no jurisdiction.

(*In re McNulty vs. Cal.*, 149 *U. S.*, 645.)
(110 *U. S.*, 516.)
(*Duncan vs. Mo.*, 152 *U. S.*, 377.)
(*In re Roberts, petitioner*, 156 *U. S.*, 183-5.)

In re Roberts, petitioner, this Honorable Court through Chief Justice Fuller, says: "The question of the sufficiency of the indictment is not a Federal question," so we insist in the case at bar the finding of the jury, the sentence and judgment of the court, condemning the prisoner to be executed, is not a Federal question, and that, therefore, upon the authority of the cases last above referred to this Honorable Court is without jurisdiction in this case.

Before this Honorable Court can take jurisdiction and even determine whether a Federal question is involved this Federal question must have been raised or presented in some

way and passed upon by the State Court.

(See authorities heretofore referred to on this question.)

(*In re Lemon*, 150 *U. S.*, 393-398.)

(*M. C. & L. R. Co. vs. Swan*, 111 *U. S.*, 379.)

(*Kentucky vs. Powers*, 201 *U. S. Report*, 1.)

In the case of *M. C. & L. R. Co. vs. Swan*, 11 *U. S.*, 379, this Honorable Court said:

> "The rule springing from the nature and limit of the judicial power of the United States is inflexible and without exception, which requires of this Court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, and then of the Court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect of the relation of the parties to it."

This principle has been again and again affirmed.

(*Great Southern Fireproof Hotel Co. vs. Jones*, 177 *U. S.*, 449-453, and authorities there cited.)

(*Ky. vs. Powers*, 201 *U. S.*, 35-36.)

It is important to notice that there was no claim in the case at bar that either the Constitution or Laws of Tennessee that denied the civil right of colored people, or their enforcing the equal protection of the law. The Constitution and Laws of the State of Tennessee makes no distinction on ac-

count of race, color or condition. The act gives the right of removal only to persons who are denied or cannot enforce, in the judicial tribunal of the State his equal civil right, and this is to appear, or in other words this question must be raised and denied by the State Court.

(*Neal vs. Delaware*, 103 *U. S.*, 370-386.)
(*Bush vs. Kentucky*, 107 *U. S.*, 110-116.)
(*Gibson vs. Miss.*, 162 *U. S.*, 565-581-584.)
(*Smith vs. Miss.*, 162 *U. S.*, 592-600.)

In *ex parte Watkins* (3 Peter, *p.* 201-2), this Honorable Court, through Mr. Chief Justice Marshall, says:

> "A judgment in its nature concludes the subject on which it is rendered and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other Courts. It puts an end to inquiry concerning the fact by deciding it. We have no power to examine the proceedings on a writ of error, and it would be strange if under a color of writ to liberate an individual from unlawful imprisonment we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous."

The criminal court of Hamilton County, Tennessee, is a court of record, as is also the Circuit and Supreme Courts of the State.

In the case of *ex parte Watkins*, above referred to, the Court says: "To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties."

The declaration that there are Federal questions involved in the petition, (as in the case at bar) for writ of *habeas corpus*, as shown to be untrue by the record, or if the Federal questions sought to be determined were not made before or on the trial of the cause, but only presented in the petition, they come too late and this Honorable Court has no authority to inquire into the judgment of the Court of criminal jurisdiction.

It is too late to raise the Federal question by statement in the writ of error and petition for citation.

(*Hulburt vs. City of Chicago*, 202 *U. S.*, 275.)
(*Rawlings vs. Ga.*, 201 *U. S.*, 638.)

The petition for writ of *habeas corpus* in the case at bar fails to make out a case entitling petitioner to a discharge or relief, as the grounds stated therein are absolutely frivolous, without foundation and shown to be untrue by the record; and it also shows that no Federal question was presented to the trial court. Therefore, petitioner could not be discharged, and this Court have no jurisdiction over the matter. The Federal question must be raised before or on the trial of the cause in the State Court and cannot be raised by petition.

(*Storti vs. Mass.*, 183 *U. S.*, 138.)
(*Bradley vs. Lightcap, No.* 3, 195 *U. S.*, 25.)
(*Bonin vs. Gulf Co.*, 198 *U. S.*, 115-117.)
(*Lampasas vs. Bell*, 190 *U. S.*, 276-282.)
(*Muse vs. Arlington Hotel Co.*, 168 *U. S.*, 430.)
(*Ainsboro vs. U. S.*, 159 *U. S.*, 695-7.)
(*Chicago & N. W. Ry. vs. Chicago*, 164 *U. S.*)

We might and could refer to many other authorities on the same line, but we deem it unnecessary and a waste of time to further cite authorities on these questions.

SUMMARY.

I.

For defendants Shipp and Gibson, we respectfully but earnestly insist, as hereinbefore set forth, that the Government has failed to make out by competent and relevant proof, or by the weight of proof, the charges contained in the information, or any one of them, but on the contrary, as we insist, the proof negatives every charge contained in the information. Not only that, but it shows that these defendants were not informed of the likelihood of a mob as alleged. It even goes further and shows that there was no indication or evidence whatever that would indicate or lead these defendants to suspect that there was likelihood of a mob occurring the night on which he was mobbed.

II.

The charge contained in the information that these defendants Shipp and Gibson, or defendant Shipp, or either of them, conspired with each other or anyone else, by which the usual guard at the jail was to be removed, in order to make it more easy for the mob to carry out its purpose, is not only denied by defendants, but is proven from the proof in the record to be absolutely untrue, and there is no proof offered by the Government sustaining said allegation in the information; or at least no sufficient proof, especially so when considered in connection with the denials of defendants and the proof sustaining their side of the question.

III.

There is not, as before stated, a syllable of proof in this entire immense record even tending to show that there was a conspiracy entered into by the defendant Shipp, sheriff, or any of his deputies to withdraw the guards or for any other purpose looking to the lynching of Johnson.

IV.

We respectfully call to the attention of this Honorable Court, the fact that this record shows that the defendants Shpp and Gibson are men of good character; that their character is shown by many witnesses to be of the highest, and especially is this true of defendant Shipp. Not a man

in Chattanooga stands better as a man, a citizen and an officer than he does, and not one syllable of evidence to the contrary. These men are now old. They have lived honest and correct lives as citizens of this community since 1874. Defendant Shipp has held honorable positions before that of Sheriff and has always discharged faithfully the duties encumbered upon him as an official and as a citizen of this Government. He is shown by the proof to be a man of the highest character; a man of honor and of truth, a man in favor of law and order. These things all weigh in his favor and against his guilt. Then, in addition the record in this cause shows that he, as an official, as the Sheriff of Hamilton County, with the lights before him, as detailed by the proof in this record, did what he believed to be to the best interest for the protection of the prisoner Ed. Johnson from the time Johnson was arrested on up until the lynching actually took place. It is shown by the proof that there was nothing that occurred at that time to indicate or to put the Sheriff and his deputies upon notice that a lynching might be expected at that time, but on the contrary the record shows that it was not to be expected.

V.

We, therefore, insist that if this or these officers did not have the information and that there was nothing brought to their knowledge that would lead them to suspect a lynching,

that they certainly are not guilty of any of the charges contained in the information, and no adverse criticism of his action should or can justly be made upon his conduct at that time.

VI.

I am here before this Honorable Court, not simply as the attorney of these defendants, but as the friend in arms of these old Confederate soldiers, with the view and for the purpose of aiding in so far as my humble ability can do so, this Honorable Court in reaching a correct conclusion and to see that it does not punish innocent parties, if I can show it that these parties are not guilty, as I believe I have done from the record, and that they be discharged.

VII.

In saying this I desire to state further that I am not a paid lawyer in this case, but the friend and lawyer of these old comrades, without the expectation or hope of any reward whatever except that if I can show to the Honorable Court, as I believe the record authorizes, that these parties are not guilty of the charges made against them, I will have accomplished all that I desire in this case, and it will be my only reward or compensation.

VIII.

I, therefore, most respectfully but most earnestly insist that the Honorable Court has unwittingly or in overlooking

some of the facts presented by this immense record, committed the errors as hereinbefore set forth, and that a new trial should be granted these defendants, or at least a review of this Honorable Court should be had and the defendants discharged.

All of which is most respectfully submitted.

M. H. CLIFT,
Attorney for Defendants Shipp and Gibson.

JUDSON HARMON,
ROBERT PRITCHARD,
WILLIAM D. SPEARS,
ROBERT B. COOKE,
JAMES J. LYNCH,
Associate Counsel.

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SEP 30 1909
SUPREME COURT U. S.

No. 4. Original.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

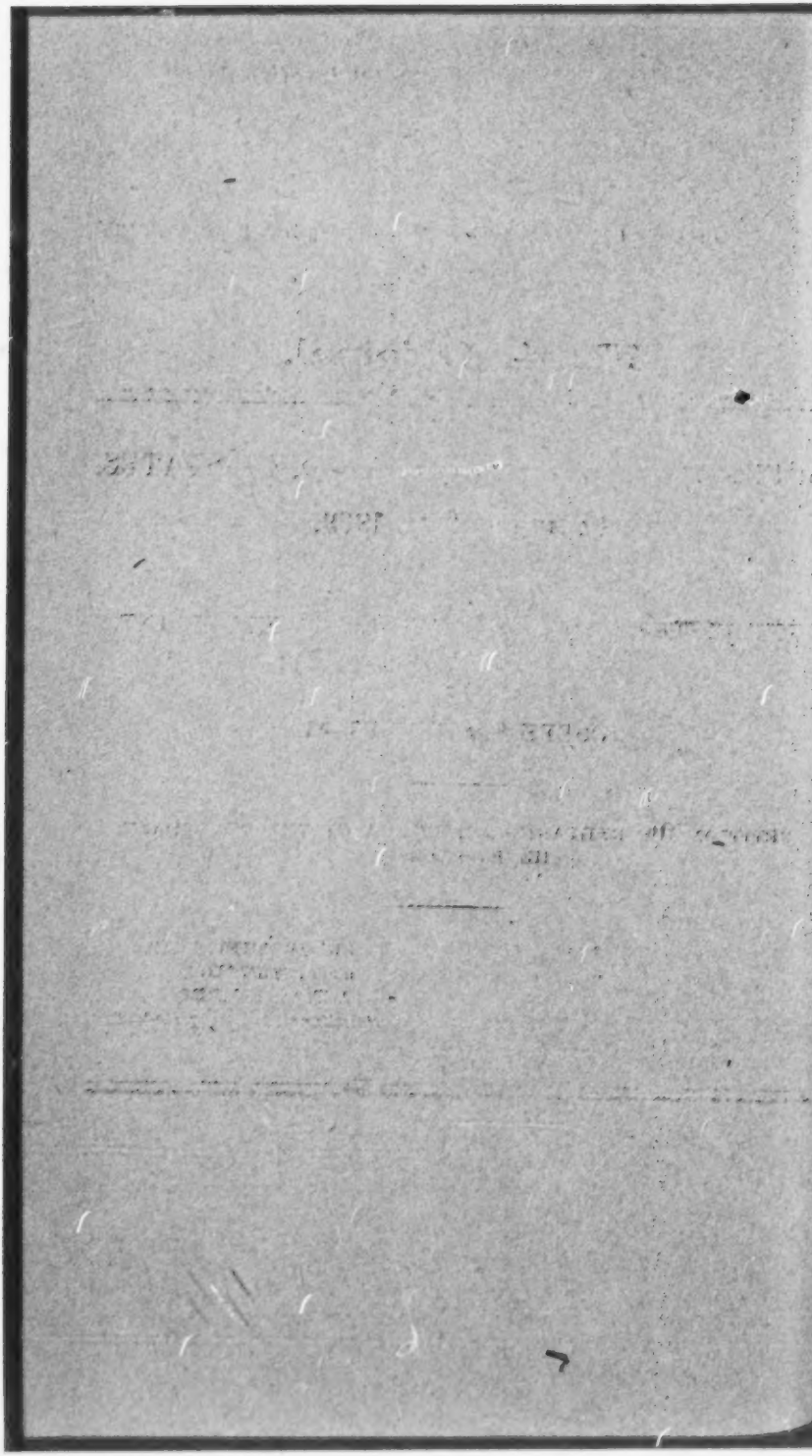
THE UNITED STATES OF AMERICA, COMPLAINANT,

vs.

JOSEPH F. SHIPP ET AL.

PETITION FOR REHEARING ON BEHALF OF THE DEFENDANT, HENRY PADGETT.

LEWIS SHEPHERD,
M. A. FLEMING,
T. P. SHEPHERD,
Solicitors for Henry Padgett.



1 IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

THE UNITED STATES OF AMERICA, COMPLAINANT,
v.
JOSEPH F. SHIPP ET AL, DEFENDANTS.
} No. 5. Original.

INFORMATION IN CONTEMPT.

PETITION FOR REHEARING ON BEHALF OF THE DEFENDANT, HENRY PADGETT.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner, Henry Padgett, one of the defendants in this case, is greatly aggrieved by the judgment of this honorable court finding him guilty of the contempt charged against him in the information filed by the United States against Joseph F. Shipp and others, and making the rule absolute as to him, and he now comes and presents this petition, respectfully asking the court to rehear and reconsider the case as to him, and to discharge the rule for contempt heretofore issued against him.

(I.)

Your petitioner, affirming his answer that he was not guilty of participating in or aiding the mob which lynched Ed. Johnson, respectfully reminds the court that he was convicted solely on the testimony of John N. Stonecipher, a witness for the complainant, who testified as to certain statements or declarations and confessions alleged to have been made by petitioner, touching the lynching of Ed. Johnson at Chattanooga, Tennessee, March 19, 1906.

2 Stonecipher testified that on the afternoon before Johnson was lynched he met up with petitioner and William Mayes, another defendant, and that petitioner asked him if he had heard what the Supreme Court had done in the Johnson case; to which Stonecipher replied: "I told him that I had understood that they had postponed the execution," and petitioner remarked, "Yes, that is what he understood, and it was a damned outrage." * * * Then pe-

titioner said: "They had no business interfering with our business." * * * That is about all that Padgett said. Then Mayes said: "We will see to that ourselves." This remark to Stonecipher was made in the presence of petitioner. (Printed record, pp. 311–312.) Stonecipher further testified that on the morning of March 20th, after the lynching, he went into Ransom's saloon, and saw Padgett; that he had a copy of the Chattanooga Times, and the first thing he said was, "This damn paper has printed a lie about this lynching." Stonecipher said, "How do you know it is a lie, Henry?" In reply to the question "What did he answer?" witness said, "Well, he told me he was there." Just then Stonecipher says, Alf Handman, one of the defendants, came in, and petitioner turned up his shoes and said, "Why, I haven't got the mud off my shoes yet." Handman replied, "I cleaned mine before I came." The Government's counsel said, "Was anything further said between you at that time?" The witness answered, "And Henry said, 'we did the nigger up all right, didn't we?' Alf says, 'You bet we did.' That is all that was said."

The witness further testified that Walnut street, in Chattanooga, between 3rd and 4th, was paved with white clay or dirt. (Record, pp. 313–314.) This is all the evidence against petitioner, except the testimony of Thomas A. Dobbs, found in the record, page 434, which we quote here.

3 (II.)

This is criminal contempt, and the facts having been denied by petitioner, he ought not to be convicted except on very clear and satisfactory proof. The law of reasonable doubt applies in all criminal cases, and if there is a reasonable doubt of guilt, the accused should be discharged, and we respectfully insist that this rule should be applied in this case. Even if your honors hold that the reasonable-doubt doctrine does not obtain in a contempt case like this, you can not avoid coming to the conclusion that the evidence of guilt to warrant a conviction in this case must be clear and convincing. The burden is on the Government to make out its case by convincing proof.

We respectfully insist that under either rule the petitioner should have been discharged on the case made by the evidence for the Government.

(III.)

The declaration made by petitioner to Stonecipher before the lynching was simply a complaint that the Supreme Court had interfered in a matter which petitioner and Mayes thought was outside of their business. It was silly talk on the part of two ignorant carpenters, but was no evidence of a participation in the lynching which followed. The alleged confession of petitioner in Ransom's saloon on the morning following the lynching was insufficient to authorize conviction of a high crime like the lynching of Ed. Johnson was.

Confessions deliberately made constitute a high grade of evidence, but loose, flippant, idle statements are not to be relied on. It was

the mere bravado of barroom loungers when petitioner said he was at the lynching and that "we did the nigger up all right."

Stonecipher testified about the condition of the paving material on Walnut street between 3rd and 4th, and that when Hand-
4 man came into Ransom's saloon on the morning after the lynching, petitioner, holding up his shoe, said: "I haven't got the mud off my shoe yet." The witness did not answer the question, "What was the condition of his shoes?" (Record, 314.) It was not shown that petitioner had mud on his shoes, or any of the kind of white clay or dirt with which Walnut street was paved was on his shoes.

(IV.)

It is respectfully insisted that this honorable court was in error in the statement of the majority opinion that the alleged statements on the afternoon of the 19th and morning of the 20th demonstrated petitioner's guilt.

The testimony of the witness Dobbs does not corroborate Stonecipher, because the statement of petitioner as to which he testified were made at a different time and place from that related by Stonecipher. Stonecipher refers to a conversation which he says occurred on the inside of Ransom's saloon at 7.30 a. m., when petitioner, Stonecipher, and Handman were the actors. (Record, 314.) Dobbs says that what he heard was in front of Ransom's saloon, and it was in a conversation between petitioner and Stonecipher and Mayes. What petitioner then said was, "They fixed that damned nigger last night." He did not say "we," as Stonecipher said he did inside the saloon. (Record, p. 435.)

(V.)

It is respectfully insisted that the testimony impeaching the character of the witness Stonecipher was enough to overthrow his testimony entirely, and that the attempt to restore him was not a successful one. The alibi proven by petitioner seemed to be a conclusive one. It is respectfully insisted that an alibi when fully established, as this was, is a complete defense. The fact that this defense is often fabricated and fraudulent ought not to militate against an honest alibi perfectly made out, as this was.

5

(VI.)

The witness Stonecipher is contradicted in a material way. The testimony taken for Alf Handman was not printed, because the information was abandoned as to him. His testimony, however, is on file and is a part of the record of this case. Mr. Handman's testimony will be found at page 628 et seq. of the original record. He denies emphatically the entire testimony of Stonecipher as to the saloon episode. He had no conversation with petitioner, was not at the saloon, and did not know either Stonecipher or petitioner. His

testimony was manifestly not considered by the court on the hearing, because it was not printed, but your honors are requested to consider it on this application for a rehearing. In this connection petitioner shows to the court that the record discloses that Handman (called Alf Hammon) did deny the testimony of Stonecipher so far as it related to him. The Attorney-General entered a motion to dismiss the information against Handman (called Alf Hammon) because the evidence was deemed insufficient to justify further prosecution. (Record, p. 1172.)

In the motion the testimony of Stonecipher against Handman is set out in *haec verbae* (Record, p. 1176), and it is averred that these statements of the witness Stonecipher were denied, and the pages of the original record containing the denials are given. (Record, 1176.)

(VII.)

Newly discovered evidence.

After the opinion of this honorable court making the rule absolute against him, and after the court granted petitioner leave to file a motion for a rehearing, which was on June 2, 1909, and after petitioner returned to Chattanooga from Washington, where he was taken in custody of the marshal on an attachment awarded by this court, he ascertained that he could prove by Hon. M. H. Doughty,
6 then president of the board of aldermen of the city of Chattanooga, that petitioner was at the Stag Hotel bar and pool room at the time of the lynching of Ed Johnson. Petitioner herewith files as an exhibit to and part of this petition the affidavit of Mr. Doughty, and asks that the same be considered on this application for a rehearing. Under the facts and circumstances of this peculiar case, petitioner prays your honors to look to and consider the affidavit of Mr. Doughty. It is so pertinent as to fixing the time when the lynching was going on, and comes from such a high source as that the court ought readily to receive it, notwithstanding the ordinary rule which forbids the granting of a rehearing on mere cumulative evidence.

LEWIS SHEPHERD,
M. A. FLEMING,
T. P. SHEPHERD,
Sols.

Counsel for petitioner respectfully certify that the foregoing petition is not interposed for delay, and they further certify that they believe said petition is well founded in law.

T. P. SHEPHERD.

7 I, Henry Padgett, the petitioner in the foregoing petition make oath that, owing to my poverty, I am unable to bear the expenses of printing the petition and exhibit thereto, and I respect-

fully pray this honorable court to hear and consider this petition on the original typewritten draft of the petition instead of on the printed copy.

H. C. PADGETT.

Subscribed and sworn to before me this, the 27th day of September, 1909.

[SEAL.] ELLIOTT M. BUCHANAN,
Notary Public.

8 UNITED STATES
v.
J. F. SHIPP. } No. 5. Original.

Information in contempt.

In the Supreme Court of the United States, October term, 1909.

Personally appeared before the undersigned, M. H. Doughty, to me known to be a reputable man and citizen, who on his oath states as follows:

On March 19, 1906, he was president of the board of aldermen of the city of Chattanooga, Tennessee, that on that night he attended a regular meeting of the board at the city hall. The meeting adjourned between nine and ten o'clock that night. On his way home he passed through the Stag Hotel, situated on Market street, where there is conducted a hotel, barroom, and pool room. Affiant arrived there some time before ten o'clock. When he was there a man named Frank Selcer, who was one of Sheriff Shipp's deputies, came up to where he was standing and accosted him thus: "I am mighty glad to meet you here, for there is something going on a few blocks away from here, and I want to be able to prove by you where I was." Affiant did not then comprehend his meaning, but he did afterwards. At the time that affiant was talking to Selcer he saw Henry Padgett, a defendant in this case, sitting in one of the chairs which are kept along the side of the building for guests to sit in. Affiant thought that Padgett was drunk and asleep. He left the Stag and went straight to his home, arriving there about ten o'clock, or a little before. When he got to his house he heard the noise, turmoil, and shooting which took place at the lynching of Ed Johnson, from the county bridge across the river. Affiant is well acquainted with
9 defendant Henry Padgett, who is rather a striking and peculiar looking man. He has white hair and fair skin and is very much like an Albino, and affiant has known him so long and so well that it is impossible for him to be mistaken about seeing him that night at the Stag. When affiant heard the noise, turmoil, and shooting which attended the lynching he then thought about Selcers' remarks to him at the Stag, and thought he comprehended his meaning.

After the return of Padgett's lawyer from Washington in June of this year, affiant told him what he knew about the case, as shown in this affidavit, and, so far as affiant knows, neither Padgett nor his lawyer had heard anything about the matter stated in this affidavit until the time when affiant told the lawyer as above herein set out.

M. H. DOUGHTY.

Subscribed and sworn to before me this 24 day of July, 1909.
My commission as notary public expires March 21, 1912.

[SEAL.] ELLIOTT M. BUCHANAN,
Notary Public.

10 (Indorsement:) Supreme Court United States, October term, 1909.—Term No. 4, Original.—The United States of America, complainant, *v.* J. F. Shipp et al.—Petition of Henry Padgett for rehearing.—Received Sept. 30, 1909.

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SUPREME COURT U. S.

No. 4. Original.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

THE UNITED STATES OF AMERICA, COMPLAINANT,

vs.

JOSEPH F. SHIPP ET AL.

PETITION FOR REHEARING ON BEHALF OF THE DEFENDANT, WILLIAM MAYES.

LEWIS SHEPHERD,
Solicitor for William Mayes.

1 IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
JOSEPH F. SHIPP, ET AL., DEFENDANTS.
No. 5. Original.

INFORMATION IN CONTEMPT.

PETITION FOR REHEARING ON BEHALF OF THE DEFENDANT, WILLIAM MAYES.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of United States:

Your petitioner, William Mayes, one of the defendants in this case, is greatly aggrieved by the judgment of this honorable court finding him guilty of the contempt charged against him in the information filed by the United States against Joseph F. Shipp and others, and making the rule absolute as to him, and he now comes and presents this petition, respectfully asking the court to rehear and reconsider the case as to him, and to discharge the rule for contempt issued against him.

(1.)

Your petitioner affirming in his answer that he was not guilty of participating in or aiding the mob which lynched Ed Johnson, respectfully reminds the court that he was convicted solely on the testimony of John N. Stonecipher, a witness for the complainant, who testified as to certain statements or declarations and confessions alleged to have been made by petitioner, touching the lynching
2 of Ed Johnson at Chattanooga, Tennessee, March 19, 1906.

Stonecipher testified that on the afternoon before Johnson was lynched he met up with petitioner and Henry Padgett, another defendant, and that Padgett asked him "if he had heard what the Supreme Court had done in the Johnson case," to which Stonecipher replied, "I told him that I understood that they had postponed the execution," and petitioner remarked, "Yes, that is what he understood, and it was a damned outrage." Then petitioner said, "They had no business interfering with our business." That is about all Padgett said. Then petitioner Mayes said, "We will see to that ourselves." This remark to Stonecipher was made, as alleged, in the presence of the defendant Padgett.

(Printed record, pp. 311–12.)

Stonecipher furthe testified that on the morning of March 20th, after the lynching, he went into Ransom's saloon, and saw Padgett; that he had a copy of the Chattanooga Times, and the first thing he said was, "This damned paper has printed a lie about this lynching." Stonecipher said, "How do you known it is a lie, Henry?" In reply to the question, "What did he answer?" Stonecipher said, "Well, he told me that he was there."

The only evidence against petitioner was that in company with Padgett the afternoon before the lynching he made the remark, referring to the action of the Supreme Court in the Johnson case, "We will see to that ourselves" (record, 312), and that on the morning after the lynching Stonecipher met him in front of the Stag saloon, and in answer to the inquiry, "Hello, Bill, what is the matter with your nose?" he said, "I skinned it last night breaking that damned jail door down in getting the nigger out." These statements are denied both by petitioner and Padgett. Stonecipher was successfully impeached by witnesses who testified as to his general bad character, and was not restored to favor by the effort to prove for him a good character. Moreover, it is shown in the testimony of
3 Alf. Handman that this man Stonecipher testified falsely in relation to the conversation between Padgett and Handman which he said occurred in Ransom's saloon.

(See original record, p. 643 et seq.; printed record, 1176.)

The petitioner proved by members of his family that he was at his home while the lynching was in progress.

It is respectfully insisted that the court before convicting petitioner should have required either proof beyond a reasonable doubt or proof of such cogent character as to be convincing of his guilt. The declaration of petitioner, made before the lynching, even if he made it, which is extremely doubtful, was not sufficient to show participation in the work of the mob. The remark that he made on the street to Stonecipher, if he made such remark, was an idle, flippant statement. It does not rise to the dignity of a deliberate confession, and is entitled to very little if any probative force. The liberty of the citizen indeed hangs by a slender thread if he may be deprived of it on such slight evidence as this, coming from a man who is himself shown to be a bad man, devoid of reputation.

Petitioner respectfully prays this honorable court to rehear its former decision and apply the rule that the case must not be decided on a mere preponderance of evidence as in a civil case, but by convincing and cogent evidence, such as is required in criminal cases, and as in duty bound they will ever pray.

LEWIS SHEPHERD,
Attorney for Petitioner.

Counsel for petitioner respectfully certify that the foregoing petition is not interposed for delay, and they further certify that they believe said petition to be well founded in law.

4 I, William Mayes, the petitioner in the foregoing petition, make oath that, owing to my poverty I am unable to bear the expense of printing the petition, and I respectfully pray this honorable court to hear and consider this petition on the original typewritten draft of the petition instead of on the printed copy.

W. J. MAYES.

Subscribed and sworn to before me this the 4th day of October, 1909.

[SEAL.]

WM. C. SHEPHERD,
Notary Public.

(Stamped:) Office of the clerk, Supreme Court U. S. Received Oct. 7, 1909.

(Indorsement on cover:) Supreme Court U. S. October term, 1909. Term No. 4, Original. The United States of America, complainant, vs. J. F. Shipp et al. Petition of William Mayes for rehearing. Received Oct. 7, 1909.

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SUPREME COURT U. S.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
JOSEPH F. SHIPP ET ALS,
Defendants.

No. 5 Original.

INFORMATION IN CONTEMPT.

PETITION FOR REHEARING ON BEHALF OF THE DEFENDANT, LUTHER WILLIAMS.

G. W. CHAMLEE,
W. H. CUMMINGS,
W. F. CHAMLEE,
Attorneys for Defendant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
JOSEPH F. SHIPP ET ALS,
Defendants.

No. 5 Original.

INFORMATION IN CONTEMPT.

PETITION FOR REHEARING ON BEHALF OF THE DEFENDANT, LUTHER WILLIAMS.

The information filed in this case by the Attorney-General of the United States, charges in substance that on March 19th, 1906, Ed Johnson, a negro, a Federal prisoner, was taken from the County jail of Chattanooga, Hamilton County, Tennessee, by a mob composed of a large number of armed men, and carried from the jail to the Tennessee River bridge and killed; and among other things in said information, charges that this petitioner, Luther Williams, was one of the men participating in the killing of said Johnson.

The defendant filed an answer to said information in October, 1906, and in his answer he positively, emphatically and unqualifiedly denies the charges and any and all connection with or consent to the lynching of the said Ed Johnson in any form or manner whatsoever.

His answer further says, "That if Ed Johnson was as a matter of law a United States prisoner at the time that he was lynched that no notice of that fact had ever been conveyed to this respondent by any person whomsoever."

In his answer relative to the lynching and soon after learning about it, and being in the saloon business and in close proximity to the county jail, he says, "He knew that if trouble was about to occur in that neighborhood that all saloons ought to close in order to prevent members of the mob becoming intoxicated and committing violence, and for this reason he immediately closed his saloon and in a few minutes went up to the county jail, which is a distance of about 200 yards, and when he got there a mob was in control of the jail."

His answer further says, "He is well known to a number of people who were at his saloon on the night Johnson was lynched and who were about the county jail as spectators at the time, and he was not disguised; made no effort to conceal his own identity; he had no part whatever in aiding or counseling the mob to lynch Ed Johnson, and had nothing in the world to do with the entire trouble. Just like people go to see a great fire or anything else of excitement that is about to happen, he went up to the jail to see what the mob was going to do and what was going to happen to Johnson."

"He denies that he was a member of said mob or that he had anything to do either by word or action, aiding or abetting in the alleged lynching, or that he counseled or conspired or confederated with any person or persons whomsoever to lynch the said Ed Johnson.

"He denies that he endeavored or conspired or confederated or agreed together or formed a combination with any person to break or enter the county jail or to lynch the said Ed Johnson or to do any other act to prevent this Honorable Court from hearing and determining the appeal of the said Ed Johnson, or to show any

contempt for this Honorable Court, and he denies each and every allegation made in the information against him in this cause, that by implication could be construed to mean that he had aided or consented to the lynching of the said Ed Johnson, or committed any other act or conspired, confederated or agreed to commit any other act, or agreed for any other person to commit any act towards the lynching of the said Ed Johnson, or to break or enter the County jail of Hamilton County, Tennessee, or to prevent this Honorable Court from hearing the appeal of the said Ed Johnson, or to show his contempt for the orders of this Honorable Court, or to do any other act that would be disrespectful of this Honorable Court."

"WHEREFORE, this respondent says that he denies each and every allegation made against him in this cause."

The information and the answer raises two distinct propositions that must be determined adversely to him in order to convict this defendant Luther Williams. First: Was Luther Williams a member of the mob, either by word or act, that participated in and brought about the lynching of Ed Johnson? Second: If Luther Williams helped to lynch the negro Ed Johnson, had he at and previous to that time been notified that Ed Johnson was a Federal prisoner?

Upon these two questions this case must be determined.

The majority opinion of the Court in this case says: "There was in the crowd around the jail and at the scene of the lynching a substantial number of law abiding men of good character." The opinion concluding in part as follows: "This brings us to a consideration of the case in respect of the six defendants who were charged as members of the mob and participants in its action."

"As to Williams and Nolan, there is direct testimony to their participation in the lynching, and we do not think that the evidence relied on to weaken that conclusion is sufficient to do so."

With all respect it is submitted:

That the judgment of the Court in this case is manifestly erroneous and should be recalled, reversed and annulled, for the reasons hereinafter stated.

In the first place, it is respectfully submitted that there is no positive or substantial testimony in this entire record to show that the defendant Luther Williams was a participant in the lynching of the negro Ed Johnson. The nearest that was made at evidence against him was the "thought" of the witness A. J. Ware. In order that we may analyze his testimony and not make any mistake about it, we have copied immediately hereafter what Mr. Ware said relative to Mr. Williams:

Mr. Ware stated that he saw the lynching at the bridge.

By Mr. Sanford:

"Q. Did you see anybody fire any bullets into him (Johnson)?

A. Yes, I saw some men shoot him.

Q. Who was that?

A. I don't know who it was.

Q. Who did you recognize as the man?

A. I thought it was Luther Williams.

Q. How long have you known Luther Williams?

A. I have known him some four or five years.

Q How often do you see him?

A, Not often.

Q. How close was you to these men when this was happening?

A. When the shooting began I got back out of the way.

Q. How close were you when the noose was being put around his neck?

A. I was as close as I am to that table (indicating).

Q. When this man that you thought was Luther Williams was shooting, how close was you to him?

A. I was probably as far as from here to the radiator over there.

Q. Which way were you?

A. I was back towards the city.

Q. How far are you from the radiator now, in your judgment? How far is that in feet?

A. It is about 22 or 23 feet.

Q. Twenty-two or twenty-three feet? Did you recognize anybody else there that night, 'Squire; did you see anybody help to put the noose around his neck with the man you thought was Nolan?

A. I don't know that I recognized anyone positively. I do not know that I can remember now of anyone else that I even thought I knew.

Q. Make your best efforts to recollect and see if you can recollect anybody else that you recognized there that night; anybody else that was shooting or helping with the noose or helping to bring him out of the jail.

A. I did not recognize anyone coming out of the jail. I thought I recognized one, that was all.

Q. The man you have already spoken of?

A. Yes.

Q. That is Warner?

A. Yes.

Q. Did you recognize anybody helping him?

A. I said I did not.

On cross-examination Mr. Ware was asked:

Q. You were a justice of the peace at the time?

A. I was.

Q. And you had an office on East Ninth street, where great numbers of people congregate?

A. Yes, sir.

By Mr. Chamlee:

Q. You referred to a man out at the bridge that you said at the time you had some suspicion or intimation in your mind was Mr. Williams?

A. Yes, sir.

Q. You do not say it was Luther Williams, a defendant in this case, who was the man you saw there?

A. I do not say it was him positively; no, sir. I would not make affidavit that it was him.

Q. You do not know who the man was?

A. I am not sure as to who it was.

RE-DIRECT EXAMINATION.

By Mr. Sanford:

Q. You knew all of these men though at that time; you had known all of these men before?

A. Oh, yes.

Q. And you thought at that time they were the men you have named?

A. Not any more than I think now. My opinion is as strong now as it was then.

Q. Your opinion is as strong now as it was then?

A. Yes, I do not know whether it was them or not.

Q. But you thought it was?

A. I thought it was.

Q. Was it or not your best impression at the time?

A. Well, I thought it so strongly that I am telling you I thought it was them. If I had not thought it was them at the time I would not say so now; but I would not make affidavit that it was Luther Williams and neither would I that it was Nick Nolan nor Sheeny Warner, because it was so dark that you could scarcely recognize a man.

Q. Except the one you saw in the lobby?

A. I walked up by the side of Mr. Pritchard, right against his shoulder, before I was sure it was Bob Pritchard and I have known him since he was a boy. Tr. p. 395 and 399.

Q. Do you know whether there had been any rumor that the

negroes were going to go for the lynchers? Had you heard anything of that sort?

A. There was some shooting down on the right hand side of the bridge and I got two or three little shot through an overcoat that I had on. I thought by that it was them. It came from the upper side.

Mr. Ware was recalled as a witness and asked again relative to the lynching.

By Mr. Sanford:

Q. Did you see Luther Williams there on the bridge?

A. I gave my testimony in that case that I thought I saw him, but that I would not make affidavit that it was him.

Q. What did you see him do?

A. I don't say I saw Luther Williams do anything.

Q. What is your recollection as to the man you took to be him?

A. He shot the negro when he fell.

Q. How many times?

A. Five.

Q. Five times?

A. Yes.

Q. How close were you to him at that time?

A. In the neighborhood of twenty or twenty-five feet.

Q. How long had you known Luther?

A. Why, I have known him for several years, but I have only been associated with him for the last three or four years—since he was a little boy.

Q. How have you been associated with him?

A. Well, just meeting him.

Q. Do you belong to any lodge with him?

A. I think so.

Q. You do belong as a matter of fact to the lodge he belongs to?

A. I do.

Q. And Nick Nolan belongs to that lodge?

A. He does.

Q. And Luther Williams and Charlie Powell belong to that lodge?

A. If Charlie Powell does I don't know.

Under cross-examination he said:

By Mr. Chamlee:

Q. In your testimony the other day you stated then that you did not know whether the man you refer to as Luther Williams was in fact Mr. Williams or not. You did not know it at the time and you did not know it then?

A. I so stated at that time.

Q. And you do not know now whether it was Mr. Williams or not?

A. No, sir.

Q. That was a mere impression you had; that is all you undertook to say?

A. That is what I said.

Q. You have been a justice of the peace and a judicial officer for a number of years?

A. Yes, sir.

Q. And you would not go before a court and convict any man on what you say about Luther Williams, would you?

A. I would not.

Exceptions for the Government.

Q. Anyway, you are the judge of what you know about it, and your testimony the other day and what you mean to say now is that you saw a man there and with the slight sight you had of him, it seemed to you it might be Mr. Williams?

A. Yes, sir.

Q. But you do not say it was and you did not say it was the other day, and you would not say at all that it was Luther Williams?

A. No, sir.

Q. And you do not undertake to create the impression that by having known him for a good while you were swearing now it was Mr. Williams.

A. I do not.

Q. You do not want that impression to be made at all by your testimony that it was Mr. Williams?

A. I do not. It was simply an impression of mine at the time. That is what I stated the other day.

Q. And it is the same with reference to Mr. Warner, that your impression then was that it was him, but you do not want to convey the impression that you are swearing now it was either the one or the other.

A. I do not swear it was him. Tr. p. 534, 535, 536."

We desire to call the attention of the Court to the fact that Mr. Ware nowhere says that he can or would undertake to identify Luther Williams as being one of the lynchers in this case. In answer to the question as to who it was that shot Ed Johnson, Mr. Ware said "I don't know who it was." In another answer he says "I don't say it was him positively; no sir; I would not make affidavit that it was him." In another answer he says: "I am not sure as to who it was." The strongest thing that he says about it is, "I thought it was Mr. Williams."

Mr. Ware says in explaining why he could not tell who the parties were that killed Johnson: "It was so dark that you could scarcely recognize a man. I walked up by the side of Mr. Pritchard, right against his shoulder, before I was sure it was Bob Pritchard, and I have known him since he was a boy."

Mr. Ware was asked:

Q. "When this man you thought was Luther Williams was shooting how close was you to him?

His answer was, "About 22 or 23 feet."

We submit that right here Mr. Ware shows that he was not close enough to recognize the man doing the shooting, because he

was almost against Mr. Pritchard, whom he well knew, before he could recognize Pritchard. Therefore, it will not do to say that Mr. Ware could recognize Mr. Williams 22 or 23 feet away when he could not recognize Pritchard until he was right against his shoulder.

Mr. Ware was asked this question:

Q. "You don't know whether it was Mr. Williams or not?"

A. "No, sir."

Q. "That was a mere impression you had that is all you undertake to say?

A. "That is what I said.

"You have been a justice of the peace and judicial officer for a number of years?

A. "Yes, sir.

Q. "And you would not go before a court and convict any man on what you say about Luther Williams, would you?

A. "I would not.

Q. "And you do not undertake to create the impression that having known him for a good while, you swear now it was Mr. Williams?

A. "I do not.

Q. "You do not want that impression to be made at all by your testimony, that it was Mr. Williams?

A. I do not. It was simply an impression of mine at the time. That is what I stated the other day."

It is most respectfully submitted that there is nothing in this testimony to convince the mind or to lead to the conclusion that Mr. Ware's testimony proves a thing in the world other than he saw some man shooting Ed Johnson and that he had a bare impression at the time, or "thought" that it was Luther Williams, and at the same time shows himself to be such a distance away from the man doing the shooting and explains that it was so dark that he could not recognize a man until he was right up against him. It is

respectfully submitted that no man ought to be convicted or even indicted under this evidence, because the witness himself is not willing to say under his oath or to make affidavit that the defendant Williams is the guilty party; and we cannot well conceive how, if the witness is unwilling to swear that the defendant is the guilty man, that this Honorable Court could conclude from the evidence of Mr. Ware that the defendant Williams ought to be held for contempt of this Honorable Court.

It seems to us that the testimony of Mr. Ware, in view of his official position, ought to be considered as vindicating rather than convicting this defendant, because Mr. Ware says that he would not himself convict any man on what he knows about this case! Moreover, at the time of this lynching, Mr. Ware was a justice of the peace with an office, doing business under the laws of the State of Tennessee; and it was his duty under the statutes of Tennessee, if he knew or had reason to believe that Luther Williams was guilty of this offense, to issue a warrant for his arrest and to have him committed to jail. There is nothing in this evidence, as we construe it, that shows that Mr. Ware was inclined to conceal or withhold anything that he knew about this case, but, on the contrary, that he made the strongest statement that he could make and keep within the bounds of what he conceived to be the truth, and yet that was simply an "impression" of his at the time of the killing, that it was probably Mr. Williams to whom he referred. If Mr. Ware had been disposed to conceal the fact that he thought Mr. Williams was connected with this offense, he could easily have done so by remaining silent, and he being a peace officer under the State law, it was his sworn duty after this crime had been committed to enforce the law of the State, if he knew or had reason to believe, or, if as the statute of Tennessee says, if there was "probable cause to believe" that the defendant was guilty, then and in that event, it was his duty to issue a warrant for the arrest of the defendant, and he did not see fit to do so. And it cannot be

said that Justice of the Peace Ware was afraid or unwilling to do his duty, nor that as a judicial officer he was unfit for the position he held.

The next witness that mentioned in the record the name of this defendant, was a colored man named Robert K. Lyons. We wish to call the Court's attention to the evidence of this man, as it is evident that he was so negligent that little or no dependence should be placed in or credence given to what he swears. He was asked about the lynching, and said that he went to the jail and followed the mob out to the bridge and that he saw Mr. Williams coming away from the bridge after the lynching, and he was asked as to the lynchers the following question:

"Q. Did you see anybody else come along there besides Williams?

A. I saw a great many people; indeed I did.

Q. Were any of them lynchers?

A. I don't know, and I have never said that Mr. Williams was a lyncher, either. I just saw him coming from that direction."

From this statement it is manifest that this witness does not know whether Mr. Williams had anything to do with the lynching or not. All that he says is, that he knows that Mr. Williams came from the direction where the lynching was.

Now, we want to look at his evidence a little further.

"Q. How long have you known Williams?

A. I have known him for some years.

Q. Did he come fast or slow?

A. He came in a pretty rapid gait. He just come walking leisurely along. He wasn't in a hurry and he wasn't anyways slow."

We submit that not the slightest credence should be given a man who would go on a witness stand and under oath volunteer a statement like this.

This witness was further asked relative to Mr. Williams:

"Q. Did he have any firearms?

A. None as I saw.

Q. You did not see any firearms?

A. No, sir. Tr. p. 352."

Now, it should be borne in mind that if this witness had seen Mr. Williams shooting Ed Johnson at the time of the lynching when Williams passed out by the witness, he would certainly have tried to identify him as one of the alleged lynchers. And in view of the prejudice and the feeling that he exhibited, as shown by this record, it is absolutely certain that if he had known that Mr. Williams was the man that he would have sworn positively to that fact upon the trial. And the very fact that he failed to do so shows that he did not know who the parties were that killed Ed Johnson. If his testimony is to be believed at all he proves for the defendant Williams that the defendant did not have on a mask and was not disguised, and, therefore, the insinuation that Mr. Williams may have been disguised is shown to be untrue.

Another statement in the testimony of this witness, we desire to call to the attention of the Court, is contained in the following question and answer:

"Q. When this man Williams passed you, were you on the bridge?

A. I was, sir; yes; right near the end of it.

Q. Where was Williams at the time the man was lynched?

A. I couldn't tell you. I am inclined to think he was back there with the rest of them in the crowd.

Q. Do you not know whether or not Williams had passed you into town before the man was lynched?

A. I do not; no, sir.

Q. You did not see Willims have anything to do with the lynching?

A. I couldn't see anything that anybody had to do with the lynching at all, sir. Tr. p. 353"

From these questions and answers it is evident that this witness does not know whether Williams was a party to this lynching or not.

This witness says that he does not know whether Mr. Williams was a lyncher or not; that he saw him coming from the bridge and recognized him, because he was acquainted with him; that he did not see any firearms, and there is nothing in his evidence to show that Mr. Williams was not present as a spectator just as a large number of other law abiding citizens were on this occasion.

Lyons further testified as follows:

"Q. Were any of them lynchers?

A. I don't know, and I have never said that Mr. Williams was a lyncher either. I just saw him coming from that direction."

Now it cannot be insisted or argued from any evidence in this record that this witness proves a single circumstance connecting Williams with this lynching.

It must be borne in mind all the time that Mr. Williams in his answer admitted having gone to the jail and followed the mob out to the bridge, as did a number of other law abiding citizens, but it has never yet appeared to us that that was an offense for a citizen to follow a mob at a lynching, and we were surprised at the argument of the Attorney-General, Mr. Bonaparte, when this case was on trial, when he said that Mr. Williams was "placidly" consenting to the lynching of Ed Johnson, and that he based his reason for a conviction upon the ground that Mr. Williams was present and "placidly" consented to the lynching.

There is no criminal statute in the law books that we have been able to find or any judicial decision that says that the presence and nothing more at a lynching is a violation of the law. Many law abiding peeople might just as well have been convicted in this case for being present and failing to offer resistance as Mr. Williams. Some men offer resistance, it is true, because they want to uphold the law. Others fail to offer resistance who are equally

willing to uphold the law, but are afraid the slightest offer of resistance would mean their own death; and it is not surprising that a stranger who was not an officer would stand by and take no hand on either side in the lynching, such as that referred to in this case.

If there was any question about Mr. Williams being an innocent man without taking his own testimony at all into consideration, we submit that that question is settled absolutely and unqualifiedly by Mr. R. E. Pritchard, who testified as follows:

By Mr. Sanford:

"Q. Did you see who fired the shots?

A. Yes, sir.

Q. Who was it fired the shots?

A. The man that fired the shots was a man that I did not know. Do you want me to tell you about that man?

Q. Yes, that is what I asked you.

A. The man who fired the shots was not Bart Justice or Luther Williams. It was a man who very much resembled Bart Justice, who has a moustache; but is lower and who has as much stomach on him and more muscular man and a man I never saw but once before. I met him on Cherry street when there was no one around from whom to find out who he was. The day after the lynching he stopped me and says—

Q. I am not asking what the man said to you the next day, but what you saw that night?

A. That is the next time I saw him and that is the only other time I saw him. Tr. p. 780 and 781."

By Mr. Chamlee:

"Q. You saw the man on Cherry street after the lynching was over as I understand, that fired the shots into the body of Johnson, the day following?

A. Well, as near as I could be sure of any two men whom I never had seen before, that was the man.

Q. The man spoke to you and said something to you about the lynching?

A. Yes, sir.

Exceptions for the Government.

Q. I will ask you to state whether or not the man that you saw fire the shots into the dead body of Ed Johnson was either Luther Williams or Nick Nolan or Bart Justice?

A. No, sir. The man that fired the shots into the man's body was not any man that is a defendant in this case so far as I have seen.

Q. You know all of these three men I have named, Nolan, Justice and Williams?

A. Yes, sir, I know them when I see them. Tr. p. 783."

We beg to call the attention of the Honorable Court to the explanation that Mr. Pritchard gives as to how he knows that the man who fired the shots into the dead body of Ed Johnson was not Luther Williams. The next day after the lynching in this case Mr. Pritchard met the man on Cherry street and the man stopped and spoke to him, and Mr. Pritchard swears positively and emphatically that the man who fired the shots "was not Bart Justice or Luther Williams." He says, "It was a man who very much resembled Bart Justice." There is not a word in the record that indicates that Williams and Justice look anything alike, but on the contrary that Williams was a man of small stature while Justice was a tall man, a blacksmith, large, muscular and very strong. Mr. Pritchard says that the man that fired the shots was a man that he had never seen before, while he says:

"Q. You know all of these three men I have named, Nolan, Justice and Williams?

A. Yes, sir, I know them when I see them."

Counsel for the government in their brief filed in this cause refers to Mr. Pritchard's testimony as follows: "Pritchard's testi-

mony which apparently conflicts with this very positive testimony of Ware is of little value because of Pritchard's dazed condition at the time of the shooting, Pritchard a few minutes before having been knocked down by a severe blow. It is possible that Pritchard's testimony refers to some other man who may have fired."

This argument is plausible, yet fallacious for the reason that Mr. Pritchard was not dazed the next day when he met the man on Cherry street, and whatever may have been said about his condition at the time of the actual lynching, it is completely cleared up by the fact that on the next day he met this identical lyncher on Cherry street and the man spoke to him about their troubles of the night before, and Mr. Pritchard swears positively and emphatically that that man was not Luther Williams.

Mr. Attorney-General Bonaparte in his closing speech in this case referred to the following extracts in the testimony of Mr. Williams and insisted it was significant that some one should ask him "why he was not at the lynching."

"Q. How came you to go up to the jail at all and to follow this mob, Mr. Williams?

A. Well, I was in the saloon at work and some one came to the rear end of the saloon and asked me why I wasn't up to the jail; and I asked him—

Q. I did not ask you for any of the conversation.

A. Some one came to the rear of the saloon and notified me that there was a mob up at the jail.

Q. What I was asking about was, whether or not you went up to the jail for the purpose of helping lynch Ed Johnson or for some other reason?

A. Well, it was natural to go to a thing of that kind if you heard of it, as a spectator."

Mr. Bonaparte had the advantage at the time of his speech of closing the case, when counsel for Williams had no opportunity of

a reply, and when this matter had not been referred to in the brief of the Government nor in the opening argument of its Counsel. Mr. Bonaparte forgot to call the attention of the Court to the fact that Mr. Williams was asked the following questions and made the following answers:

"Q. And you don't know the man that came for you?

A. No, sir; he did not come for me that I know of. He just mentioned it to me.

Q. Did you close your saloon at once?

A. Well, not at once. I closed it in a very few minutes, because everybody left there about that time.

Q. Did you close it up yourself?

A. Yes, sir.

Q. What became of your bartender?

A. I was tending bar alone that night."

When asked about who he saw at the jail and as to his movements and actions there, the folowing is important:

"Q. Did you speak to anybody?

A. I remember saying, 'how do you do.'

Q. Who did you 'how do you do' to?

A. Dr. Sutton.

Q. Was that downstairs or upstairs?

A. That was upstairs.

Q. Dr. Sutton was upstairs, was he?

A. Yes, sir.

Q. Did you recognize anybody up there besides Dr. Sutton?

A. I recognized Jailor Gibson, Sheriff Shipp and Dr. Sutton."

The government had the benefit of this statement and an opportunity of asking Sheriff Shipp, Jailor Gibson and also Dr. Sutton if Mr. Williams had any part in the lynching of Ed Johnson; and both Sheriff Shipp and Jailor Gibson stated that they did not

know the men doing the lynching, and especially do they make no reference to Mr. Williams as being a party to that unhappy occurrence.

Solicitor-General H. M. Hoyt in discussing this case with others, said to this Honorable Court that the Government "did not have a perfect case" and at no time in his speech did he ever say that he thought or that he believed that under the evidence that this man ought to be convicted.

Mr. Bonaparte did not insist that this defendant was an "active participator in the lynching," other than the reference in his brief to Mr. Ware's testimony, but his argument was in the main that Williams was present and a "placid" consenter to the lynching.

Upon the facts with deep respect we insist that under the proof this is an innocent man. That this Honorable Court has made a mistake in its finding in this case.

"*Now, has the Government shown that Luther Williams knew that Ed Johnson was a Federal prisoner?* We challenge this record from first to last, and assert that there is not one word of evidence anywhere that shows that Mr. Williams knew or had ever heard from any source whatsoever that Ed Johnson was a Federal prisoner, and in his answer Mr. Williams sets up this defense and put the Government on notice many months before the testimony was taken in this case; and on that branch of the case the Government wholly and totally failed to produce one word of proof to show that this man Williams knew that Ed Johnson was a Federal prisoner. In the absence of such knowledge on the part of Williams, it is impossible to say that he could be guilty of a contempt of this Honorable Court, because in order to make a contempt of court the offender should do or perform a wrongful act for the very purpose of displeasing, or showing disrespect to or for the orders of the Court, or ignoring or otherwise violating the order of the Court. And a man could not be guilty of contempt of Court who was six or seven hundred miles away from the Court when he did

not know that the prisoner that was about to be lynched was a Federal prisoner or that this Honorable Court had acquired jurisdiction of this case. It may be said that this is a technical defense, but in any case where a man is innocent, and under such flimsy evidence as is here offered against, him, we most earnestly and respectfully submit that the defense, of "want of notice," is a legitimate defense, eminently just, and one that this Honorable Court will not ignore. In other words, notice is essential in every case of an injunction having been issued by a Court before the violators of that injunction can or should be punished for a contempt.

In this case we have a printed record composed of over twelve hundred pages, and there is not one word in that record that says any living man or any newspaper publication or any other kind or character of information was ever conveyed to the defendant Luther Williams so as to inform him that Ed Johnson was a Federal prisoner, or that an appeal had been granted in his case.

With deep respect we insist that if we were to concede for the sake of argument (but we do not concede it for any purpose), if we were to concede for the sake of argument that the defendant was a member of the mob that lynched Ed Johnson, and that that fact were established by the proof, it would not constitute a contempt of court under the law, for the reason that in order to make a contempt it is necessary that the offender have in his own mind and heart the purpose of showing his contempt by some outward act or omission to act, which would be displeasing to the Court or in violation of its orders.

Now in this record the Government's solicitors were especially vigilant in trying to prove notice to the Sheriff that an appeal had been allowed Ed Johnson by this Honorable Court. Now, if it were necessary to prove notice to the Sheriff of the granting of said appeal, can it be said that this defendant shall be convicted and punished upon the charge of contempt of this Honorable

Court without proof of any notice being made to him that Ed Johnson was a United States prisoner? Shall it be said that this Honorable Court will presume that because the newspapers in Chattanooga published on the day of the alleged offense, that an appeal had been granted to Johnson, that such publications were notice to this defendant when he swears positively and emphatically that he did not know of such a fact and never heard of it or learned it from any person whomsoever? It is with profound respect insisted that this Honorable Court cannot and should not impose a penalty or convict any man unless the proof in the case necessary to constitute every link in the chain of evidence is complete and that that evidence is sufficient to convict the defendant in a criminal case beyond a reasonable doubt.

A contempt proceeding has been held to be a criminal case and the same rule of evidence should apply to this trial that should be applied if this defendant were on trial in the State Court. Why should the Government insist on proving notice to the Sheriff if it were not necessary that the Sheriff have notice that Ed Johnson was a Federal prisoner? And we submit that no lawyer would argue before a Court that the Sheriff could be punished for a contempt if he had not been notified that Johnson was a Federal prisoner before the lynching of Johnson.

If it were necessary to give notice to the Sheriff, it is necessary to give notice to Williams or that Williams should have notice from some source. And the evidence in this case fails to show any notice to Williams from any source whatsoever.

Surely this Honorable Court will not presume that because the newspapers in Chattanooga published inflammatory reports about this case that every man in that large city read all the papers and knew from a reading of the papers of the orders of this Honorable Court. We have searched earnestly and diligently for some authority in the law books to authorize or justify a Court in charging to a defendant notice in some newspaper in the current publications

or news columns of such paper, but nowhere have we been able to find that a Court was authorized or justified in inferring that a defendant had notice because the same was written in the news columns of a newspaper, when an order authorizing publication of the order of Court had not been made and the publication made by the Clerk or some officer authorized by law to make such publications. Judgments and decree of courts are void for want of notice. Shall it be said in this case that notice may be dispensed with or notice inferred from newspaper publications? We most respectfully submit that in the decision of this case that this question must have escaped the attention of this Honorable Court.

Again, can it be said that because a man is guilty, if such were the case, of assisting in a lynching, that this Honorable Court would punish him for contempt without his having any notice of the orders of this Honorable Court because he was guilty of a felony although no notice had ever been given to him; we know that such a thing as that would be impossible with this Honorable Court. It may be argued, that a man who would aid or assist in a lynching would commit perjury in order to escape its penalties, and this argument may be well founded, and it may be said that a man will swear that he did not know that the victim was a Federal prisoner in order to escape the penalties of the law, and it may be true that a man who participated in such lynchings would not hesitate to commit perjury. But we submit the fact that criminals of that class might be willing to commit perjury does not relieve the Government or the courts from the necessity of complying with the forms of the law before a conviction is authorized or justified. And one of the necessary forms of the law is that "notice" shall be conveyed to the defendant through some channel or medium that will inform him that the victim was a Federal prisoner, and that when he has denied that he ever heard that the victim was a Federal prisoner, as is made in the record in this case, that then the forms of the law have not been complied with. And it is in our opinion

an overturning of all precedents that have been established from the foundation of the republic, for this Honorable Court to say that Luther Williams is guilty of a contempt of this Honorable Court upon the record in this case. And we respectfully submit, with deep respect to this Honorable Court, that there is not one word in this entire record to establish notice to this defendant that Ed Johnson was a Federal prisoner. It may be argued that ignorance of law is no excuse, and with that argument we are entirely agreed. But we insist that there is a vast difference in ignorance of the law and ignorance of an order of this Honorable Court. That ignorance of the law is no excuse, but ignorance of fact which would be ignorance of the issuance of an order of this Honorable Court, would be and always is and always has been a good excuse for non-compliance with injunctions from this Honorable Court.

In the opinion of Mr. Justice Holmes, delivered on the hearing of the preliminary questions of law in this case, it was said, "If the presence and acts should be proven there would be little room for the disavowal of intent. It may be found that what created the mob and led to the crime was the unwillingness of its members to submit to the delay required for the appeal. From that to the intent to prevent that delay and the hearing of the appeal is a short step."

We submit that it has not been proved in the first instance that Luther Williams was a member of the mob or that he was unwilling to submit to the delay required for the appeal of Ed Johnson. Our construction of this part of the opinion of Mr. Justice Holmes is, that if the presence of the parties and their active participation in the lynching should be proven after the parties had been notified by telegram or had read it in the newspapers, or learned it from some other source, then, and in that event, there would be little room for the disavowal of the intent to prevent the delay required for the appeal. But the proof does not sustain the charge, and, therefore, the decision on the preliminary question does not settle

the question that a man can be convicted of a contempt of Court for violating an order of Court, when he had no knowledge that such an order had ever been made, issued or published.

It was said in the brief of Counsel for the Government, "When this Court granted a stay of execution upon application of Johnson, it became its duty to protect him until his case should be disposed of. It matters not with what crime he was charged. It is immaterial what the evidence was at the trial."

With that sentiment we are entirely agreed. It was the duty of this Honorable Court to protect Johnson until his appeal could be heard and his rights vindicated under the Constitution. But the same obligation to protect him in his rights rests with this Honorable Court to protect this defendant Luther Williams, who comes into this Honorable Court humble and poverty stricken, asserting that he is an innocent man and begging that his rights be preserved under the Constitution and that he shall not be committed to jail or fined by this Honorable Court until the law and the Constitution have been complied with and evidence produced upon his trial that shows that he is guilty of aiding or encouraging the lynching of Ed Johnson after notice of some character had been conveyed to him, either by being told or having read it in the newspaper, or been informed in some mode or manner that Ed Johnson was a Federal prisoner and that this Honorable Court had made and entered an order granting his appeal and ordering a stay of all further proceedings in his case.

From an examination of this record it will appear unto your Honors that there is no proof in the entire transcript of notice of any kind that this defendant knew or had ever heard that this Honorable Court had made an order granting an appeal to Ed Johnson and directing a suspension or a stay of all further proceedings in his case by the State authorities. We submit that it cannot be said that this Honorable Court would be authorized to infer that his defendant knew or had been informed of the pro-

ceedings and orders taken by this Honorable Court, because he was present and witnessed the lynching in this case. In other words, as we understand the law, this Honorable Court will not infer without proof to sustain it that the members of the mob that lynched Ed Johnson lynched him solely and alone to prevent the delay necessary for this Honorable Court to hear and determine the appeal of the said Ed Johnson, because it must be apparent to your Honors that the cause producing the death of Ed Johnson was not the fact that he had appealed to this Honorable Court, but it was the belief in the mind of the lynchers that Johnson had committed in Tennessee a most horrible crime, and it was for his crime that he was lynched and not because he had appealed to this Honorable Court.

It is now submitted that if the alleged lyncher did not know that Ed Johnson had taken an appeal to this Honorable Court that this Honorable Court could not convict him of knowingly or wilfully violating an order of this Honorable Court. And it is further submitted that a man would not be guilty of a contempt of Court if he did not know that the Court had issued an order in the case, or if he did not know that his act in the premises would be in disobedience of or in violation of the order of the Court.

Mr. Williams testified in his own behalf in this case and explained why he was present both at the jail and at the bridge; that he was a mere spectator, as were many other law abiding citizens; and that he had no part whatever in the lynching; and that he is not guilty of any charge made in the information. He proves by a number of witnesses that he is a man of good character and entitled to full faith and credit on his oath in a court of justice.

It is submitted that this Honorable Court is putting a construction upon the evidence of Mr. Ware and the colored man Lyons that is far stronger than either of said witnesses meant or intended their

evidence to be, and in a large measure making said evidence of said witnesses mean just the reverse of what the witnesses evidently intended this Honorable Court to understand.

When each of these two witnesses stated that they did not know whether Luther Williams was one of the alleged lynchers or not, it was in the mind of the witness at that time that that statement would end the case as far as Williams was concerned. And we do not hesitate to say that in our opinion that if this case could be reopened for a further examination of these two men that they would say to your Honors that they could not rest satisfied for this man to be fined or imprisoned, if it had to be done alone upon their testimony. When taking this proof, Counsel for Williams understood the law to be that the proof should establish the guilt of the prisoner by a greater weight of the testimony or beyond a reasonable doubt, and that when each of these witnesses stated that it was dark and that they did not know whether Mr. Williams was a member of the lynching party or not, we were so confident that that would end the lawsuit that we felt that there was little left in the case to contend over.

Mr. Pritchard, who was present at the time of the lynching, a man whose character is above reproach and whose word is above question, stated positively that Mr. Williams was not the man that was doing the shooting referred to by Mr. Ware, and in our judgment made this case clear that Mr. Williams was an innocent man. It is, therefore, most respectfully submitted that the great weight of the evidence in this case shows that Mr. Williams is not guilty of either being a member of the mob that lynched Ed Johnson or that he had ever been informed that an appeal had been granted by this Honorable Court to the said Ed Johnson, and that upon both propositions submitted in this petition that

the defendant is entitled to a verdict, and that the rule made against him should be discharged and that he should be dismissed from the attachment.

Respectfully submitted,

G. W. CHAMLEE,
W. H. CUMMINGS,
W. F. CHAMLEE,
Attorneys for Petitioner Luther Williams.

Counsel, with deep respect, certify that the foregoing petition is not interposed for delay, and further certify their sincere belief that the same is well-founded in law.

G. W. CHAMLEE,
Attorney for Defendant Luther Williams.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
JOSEPH F. SHIPP ET ALS,
Defendants.

No. 5 Original.

OCTOBER TERM, 1908.

MOTION FOR LEAVE TO FILE PETITION TO RE-HEAR

Counsel, for Defendant Luther Williams, moves the Court for permission to file a petition to rehear this case.

G. W. CHAMLEE,
Attorney for Defendant.

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SUPREME COURT U. S.

No. 5, Original.

In the Supreme Court of the United States

THE UNITED STATES OF AMERICA, COMPLAINANT,

vs.

JOSEPH F. SHIPP, ET AL.

MOTION OF DEFENDANTS, JOSEPH F. SHIPP AND JERIMIAH GIBSON, FOR A RE-HEARING.

MOSES H. CLIFT,
JAMES J. LYNCH,
Attorneys for Defendants Shipp and Gibson.

In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
JOSEPH F. SHIPP, ET AL.

No. 5, Original.

MOTION OF DEFENDANTS, JOSEPH F. SHIPP AND JERIMIAH GIBSON, FOR A RE-HEARING.

Defendants, Joseph F. Shipp and Jerimiah Gibson, by leave of the Court first obtained to do so, and with all due and proper respect for the finding of the Honorable Court, move the Court for a re-hearing of this cause and show the following reasons why a new trial should be granted them:

I.

Because, as we respectfully insist, the Honorable Court erred in its holding on the preliminary matters in this cause, and again, in the final finding of the Court that the defendants had not purged themselves of the contempt alleged to have been committed by them, as set out in their answer, denying intention to commit contempt of court and in sub-

jecting them to liability or punishment for the alleged criminal contempt, thereby depriving them of their liberty and right of trial by jury, as provided in criminal offenses, contrary to the law of the land and the rights guaranteed to American citizens.

II.

Because, as we respectfully insist, this Honorable Court erred, in the opinion of the majority of the Court, in treating the case as a civil instead of a criminal contempt, whereas it should have held, if a contempt had been committed by them, that it was a criminal contempt and not civil, and under this record it should have held that there was no contempt committed by these defendants:

First: Because the weight and preponderance of the evidence does not sustain or justify the conclusion or establish the guilt of defendants.

Second: Because there is no material or competent, or at least sufficient, evidence of the character required in criminal cases to sustain the findings or conclusions of the majority of the Court.

Third: Because the opinion of the majority of the Court, while holding defendants guilty of a criminal contempt and subject to punishment therefor, failed to give them the benefit of the presumption of innocence to which they are entitled

under our laws when applied to criminal offenses; it failed to give them the benefit of a reasonable doubt which applies in this country to all trials of a criminal nature. The Court in effect adopted the rule which requires defendants to establish their innocence contrary to the laws and rules heretofore adhered to in this country.

III.

Because the Court, or majority of the court, erred in holding defendants guilty of contempt along lines and on matters not set out in the information which constituted the charges against defendants and that they were required to meet or defend against. In this, the information alleges a conspiracy between defendants and other persons to lynch and murder one Ed Johnson, with the intent to show their contempt and disregard for this Honorable Court, etc., whereas there is no evidence, or at least there is no competent or sufficient evidence of a competent nature, to sustain this charge. The substantive, and in fact the only specific charge or statement of fact or facts set forth in the information, on which the charge of conspiracy was founded and on which the charge of contempt was based, was that the defendants, or defendant Shipp, had removed the guards from the jail in order to facilitate or make more easy the work of said mob. These facts are denied by defendants and the evidence wholly fails to sustain these, or any of the

charges, as against these defendants. Especially is this true when the rule of evidence in criminal cases is applied to the proof offered in this case, as should be done, as it would exclude from the consideration of the Court all newspaper articles, publications, etc., and all hearsay testimony offered in the cause, as incompetent and irrelevant, and the same having been objected to at the time offered, said objections should have been sustained by the Court and said articles and other incompetent evidence excluded from the consideration of the court, as we respectfully insist.

IV.

Because the Court erred in not taking into consideration the disavowal of any intention on the part of defendants to commit a contempt of this Honorable Court and their denial that they intentionally committed any contempt of the Honorable Court, as without this intent so entering into their acts it should not be said that there was an offense.

V.

Because the Court erred in holding these defendants guilty of contempt of the Honorable Court:

First: Because the information upon which the charge is based shows that the defendant Shipp was at the time of the alleged contempt the Sheriff of Hamilton County, in

the State of Tennessee, and an executive officer of the State of Tennessee for said County, and that as such Sheriff was the legal custodian, under the Laws of Tennessee, of all persons duly committed in said County under the Law of said State, to confinement and imprisonment within said jail; " that the said *Ed Johnson was then and there a prisoner confined and restrained of his liberty in the said county jail and in the lawful custody and control of said sheriff and said deputy sheriffs under commitment duly issued out of the criminal court of said Hamilton County.*"

Second: That it was under this commitment from the Hamilton County criminal court of the State of Tennessee that said Ed Johnson was held at the time he was lynched; that while the said Johnson had not been transferred as a prisoner of the United States yet as this record shows and as we respectfully insist the defendants Shipp and Gibson, did all in their power to protect said Ed Johnson from the mob or mob violence; that they exercised their best judgment from the facts known or communicated to them for the protection of prisoners in said county jail.

Third: That having exercised their best judgment and there being no evidence of any threatened or expected mob violence on that night or at the time it occurred, as is shown by the record in this cause, and they having denied any intention to commit a contempt of the order of this Honorable Court and having exercised as executive officers of the

State of Tennessee their best judgment in the premises they should not be held guilty of contempt of the orders of this Honorable Court. Especially is this true under the proof in this record, as it shows that defendants, and especially the defendant Shipp, used extraordinary care and made extraordinary effort to protect the prisoner against violence or danger.

VI.

Therefore, we respectfully but most earnestly insist that for the reasons hereinbefore set forth these defendants should have a re-hearing or that a re-hearing should be granted them by the Honorable Court.

VII.

Defendants will on or before the meeting of the Honorable Court at its next October term present a petition asking said re-hearing in support of this motion, together with a brief of facts and of law sustaining their views as set forth in this motion and reasons why the Court should grant them a re-hearing.

All of which is respectfully submitted.

MOSES H. CLIFT,
JAMES J. LYNCH,
Attorneys for Defendants Shipp and Gibson.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 4, Original.

THE UNITED STATES OF AMERICA, COMPLAINANT,

vs.

JOSEPH F. SHIPP ET AL.

PETITION FOR REHEARING ON BEHALF OF DEFENDANT NICK NOLAN.

SHEPHERD, FLEMING & SHEPHERD,
Attorneys for Nick Nolan.

LEWIS SHEPHERD,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 4, Original.

THE UNITED STATES OF AMERICA, COMPLAINANT,

vs.

JOSEPH F. SHIPP ET ALS., DEFENDANTS.

INFORMATION IN CONTEMPT.

PETITION FOR REHEARING ON BEHALF OF THE DEFENDANT NICK NOLAN.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner, Nick Nolan, now and at all times asserting his innocence of participating in the work of the mob which lynched Ed Johnson in Chattanooga, Tennesse, March 19, 1906, comes and presents this his petition for a rehearing, as to him, of the above case, and for a reconsideration of the case and reversal of the judgment rendered

against him, making the rule to show cause why he should not be punished for contempt absolute.

The opinion of the majority of the court, rendered May 24, 1909, contents itself with the statement, "As to Williams and Mayes, there is direct testimony of their participation in the lynching and we do not thing that the evidence relied on to weaken that conclusion is sufficient to do so." The opinion does not set out the testimony relied on to show petitioner's guilt.

Petitioner respectfully asks the court to review the evidence in the record, and it is respectfully submitted that if the ordinary rule of preponderance in evidence in civil cases were applied to this case, the judgment of the court would be that the information be discharged and dismissed as to petitioner. But petitioner is advised that this is a criminal contempt, and one of the petitioners was guilty of the facts alleged, fraught with most grave and serious consequences, and that the court, before convicting the petitioner, should require a quantity and quality of proof satisfying the mind of the court to a high degree of certainty. Even if the court should not require evidence of a character sufficient to remove all reasonable doubt of guilt, still it is insisted that it should require strong and convincing proof before inflicting punishment on the petitioner. A citizen should not be denied or deprived of his liberty except upon the strongest and most convincing proof of guilt.

The case for the Government rests entirely on the testimony of A. J. Ware, and on the justice of the peace, and Deputy Sheriff Jerry Gibson, and ex-Constable Joe Franklin. A. J. Ware is relied on as the main witness for the Government, and in order to show how far it falls short of the kind of evidence the court ought to require before adjudging petitioner guilty, he sets out below every part of Mr. Ware's testimony relating to the petitioner.

Q. Did you recognize anybody else there, Squire?
A. Why, at that time I think I recognized, or thought I recognized, several people standing around.

Q. Who were they that you recognized?

A. It has been so long that I do not remember. I did not charge my memory with this and did not try to keep it in my mind.

Q. Give us your best recollection; endeavor to recollect who you saw there standing around and what they were doing.

A. Apparently the majority of them were doing just as I was—standing there.

Q. Did you see anybody put a noose around Johnson's neck?

A. I saw them when they tied the rope around his neck.

Q. Do you remember who did that?

A. No, sir.

Q. Did you see who did that?

A. Did I see the man?

Q. Yes.

A. I saw it when it was being done.

Q. Did you recognize the man?

A. No, I can not say that I did.

Q. Did you think you recognized him at that time?

A. Well, I thought I knew, but I would not be sure.

Q. Who was that?

A. Do you want facts or just my ideas about it?

Q. You know whether you recognized him or not, of course.

A. I say I thought I did, but I will not say I did. I would not make affidavit that I knew him.

Q. How long had you known the man you thought you recognized?

A. I have known him quite awhile.

Q. How well have you known him?

A. Not so well—not enough to recognize him and know him in the dark.

Q. Well, you are the one who has to do the swearing. You are the witness. Did you recognize the man there?

A. I say I do not know him well enough to recognize him and know him in the dark. I thought that I did.

Q. Who was it? What is your best impression as to the man who put the noose around Johnson's neck?

A. I thought I recognized one of the parties as Nick Nolan.

Q. One of the parties that was putting the noose around his neck?

A. That had hold of the rope.

Q. What does Nick Nolan do?

A. I think he runs a bar.

Q. How long have you known him?

A. I have known him for some time.

Q. Did you recognize anybody else besides Pool, and the one you thought you recognized as Nolan?

A. I could not say that I recognized anybody that had hold of the negro at all.

Q. Did you see anybody fire any bullets into him?

A. Yes, I saw some men shoot him.

Q. Who was that?

A. I don't know who it was.

Q. Who did you recognize as the man?

A. I thought it was Luther Williams.

Q. How long have you known Luther Williams?

A. I have known him some four or five years.

Q. How often do you see him?

A. Not often.

Q. How close were you to these men when this was happening?

A. When the shooting began I got back out of the way.

Q. How close were you when the noose was being put around his neck?

A. I was as close to him as that table (indicating).

Q. When this man that you thought was Luther Williams was shooting, how close were you to him?

A. I was probably as far as from here to the radiator over there.

Q. Which way were you?

A. I was back behind, toward the city.

Q. How far are you from the radiator now, in your judgment? How far is that in feet?

A. It is about 22 or 23 feet.

Q. 22 or 23 feet. Did you recognize anybody else that night, Squire? Did you see anybody help to put the noose around his neck with the man that you thought was Nolan?

A. I do not know that I recognized any one positively. I do not know that I can remember now of any one else that I even thought I knew.

Q. Make your best effort to recollect and see if you can recollect anybody else that you recognized there that night—anybody else that was shooting or helping with the noose or helping to bring him out from the jail.

A. I did not recognize any one coming out of the jail. I thought I recognized one; that was all.

Q. The man you have already spoken of?

A. Yes.

By Mr. SHEPHERD:

Q. Mr. Ware, I understood you to say that you were not at all certain you recognized Mr. Nolan there?

A. I am not.

Q. Your acquaintance with Mr. Nolan was so slight that you were not able to recognize him there on the bridge in the dark that night?

A. That is right.

Q. That is correct?

A. Yes, sir.

Redirect examination by Mr. SANFORD:

Q. You knew all these men, though, at that time? You had known all these men before?

A. Oh, yes.

Q. And you thought at that time they were the men you have named?

A. Not any more than I think now. My opinion is as strong now as it was then.

Q. Your opinion is as strong now as it was then?

A. Yes; I do not know whether it was them or not.

Q. But you thought it was?

A. I thought it was.

Q. Was it, or not, your best impression at the time?

A. Well, I thought it so strongly that I am telling you I thought it was them. If I had not thought it was them at the time I would not say so now; but I would not make affidavit that it was Luther Williams, and neither would I that it was Nick Nolan, nor Sheeny Warner, because it was so dark that you could scarcely recognize a man.

Q. Except the one you saw in the lobby?

A. I walked up by the side of Mr. Pritchard, right against his shoulder, before I was sure it was Bob Pritchard, and I have known him since he was a boy.

Q. Somebody hit Mr. Pritchard that night, did they not?

A. Yes.

Q. Did you see the lick?

A. I did.

Q. Who hit him?

A. I don't know who he was. I caught the man by the shoulder that struck him.

Q. Do you know who it was?

A. I told you Mr. Nolan that I thought was standing there.

Q. Oh, I did not understand that. It was Mr. Nolan you thought that hit Mr. Pritchard?

A. Yes sir.

See printed record.

The above quotation from Ware's testimony shows that he was very uncertain as to the identity of Nolan. He refuses to testify as a fact that he saw and recognized Nolan on that night, and consequently his testimony is of little weight and of slight probative effect. In fact, his testimony, even if uncontradicted, would not establish Nolan's presence. The man Ware thought was Nolan was another man.

Chivington, a reporter, who was first introduced by the complainant, was within two or three feet of Pritchard when he was struck (596).

Chivington was well acquainted with Nolan (910). He saw the man that hit Pritchard, and that man was not Nick Nolan (596). He saw the man's face and knows that it was not Nolan (Original Record, 910-917; Printed Record, 596-532-599-597).

Peaberton, deputy circuit court clerk, saw the man that hit Pritchard. He says that he did not see the man's face, but from his size and general appearance he don't think he was Nolan. He described the man as a much larger man than Nolan (Original Record, 920; Printed Record, 600-60).

So we have Ware's uncertain identification, offset by a positive statement of one witness, that Ware is mistaken, and by a statement of another witness more positive and certain than Ware.

Gibson, the night jailer, testified that he thought one of the masked men was Nick Nolan.

A. Well, I thought I knowed Nick Nolan. The man that I thought was Nolan had a mask over his face.

Q. That was Nick Nolan, that you thought was Nolan, the defendant in this case I mean.

A. I don't know whether it was him or his brother, it looked very much like him (2023).

Q. How did you recognize him?

A. It was more by the size of the man.

Q. And what else.

A. And his face was not visible to me. More by the size of the man I took it to be him (2025).

Some man was called "Nick" in the crowd and this helped witness to think he recognized Nolan (2025).

Q. State whether or not if it had not been for some one in that party used the name "Nick" you would have supposed it was Nick Nolan.

A. That was the name that made me incline to think so.

* * * * * * *

A. I just heard somebody say "Nick" (2052).

On cross-examination witness stated that he did not "mean to say positively that I recognized him." On being asked if witness identified defendant as the man he recognized at the jail, witness stated "The man that I thought was Nolan was a smaller man, apparently. If he could stand up, I could tell more about it."

"(The defendant Nick Nolan stood up as requested.)"

"WITNESS: He was a lower man it seemed to me."

* * * * * * *

A. Well the man I recognized and according to my judgment I thought was Nolan, was a smaller man than this one (2050-2051).

A. No I don't recognize him as the man (2052).

Gibson was a witness before the Hamilton County grand jury shortly after the lynching, and testified that he did not recognize any member of the mob (2054-2057).

Witness thought that one of the Nolans was in the mob (2055-2057).

A. "There was a small man there and I just got it in my head some way that it was Nolan and I heard 'Nick' called in the crowd" (2058).

The testimony of this witness is uncertain as to Nolan. It could not be otherwise in view of the fact that the man was masked. His recognition so far as it went was by the size and appearance, and when defendant stood before the witness at the hearing he refused to say he was the man, and stated further that the man he recognized was a smaller man than defendant. About all Gibson's testimony amounts to is that he thought one of the Nolan boys was in the crowd. This certainly cannot be sufficient evidence to condemn the defendant, even though there was no contradictory testimony.

Then, again, Ware and Gibson don t agree as to which man was Nolan. Gibson says his Nolan had a mask, while Ware's Nolan was without a mask. Gibson's Nolan was a small man, while Ware's Nolan was larger.

Joe Franklin, colored, testified that he saw Nick Nolan at the jail on the night of the lynching.

Through all the testimony there is carried a distinction between the mob and the spectators; the "first crowd" was the mob and the "second" or "back crowd" was made up of spectators. Franklin says that the man he recognized as Nolan was in the back crowd and not with the mob (650). The witness is involved in contradiction on nearly every part of his testimony, and this to such extent by credible witnesses that his testimony can have but little, if any, weight. It would seem that Franklin's was a different man from either Ware's or Gibson's, for the other Nolans were actively engaged in the mob, while Franklin's Nolan was a peaceable onlooker.

Franklin says he was in the northwest gate of the courthouse yard (529) when the mob passed up Walnut street (530). Pemberton says he came out by this gate and Franklin was not there (919); there was no one on the steps or in the gate (919). The gate is about 6 or 7 feet wide (931). It would have been impossible for a man to pass out of this gate without seeing another man sitting in the gateway.

H. P. Fry, a lawyer, testified that Franklin told him on the day after the lynching that he, Franklin, was not at the jail that night; "that he started towards the jail, and concluded it was not safe place for a nigger, and left" (746). This conversation occurred on the afternoon of the day following the lynching, when the subject was fresh and under general discussion (746).

Without pointing out in detail, the entire testimony of the witness exhibits a great amount of prejudice against the defendants. His willingness to testify against the defendants, his reluctance on the other side, and his general demeanor on cross-examination shows that he regarded the issue as one between the whites and the blacks, and he was decidedly in favor of the blacks.

Franklin's record is not at all good. He has been indicted several times in the courts of Hamilton county, Tennessee (537-546-548), and in one case admitted guilt of defrauding the county by collecting illegal fees (542).

The testimony of this witness stands by itself. There is no corroboration by Gibson and Ware, for the reasons that evidently each is attempting to identify a different man. So we have Franklin standing alone with strong contradictions in almost every particular. His statements as to what happened at the jail are denied by the sheriff and the deputies; his statement that he was in the court-house-yard gate is flatly denied by Pemberton, and he has himself stated that he was not at or about the jail on that night. With this unfavorable condition is Franklin's testimony to be taken as conclusive of Nolan's presence in the face of the positive evidence of Nolan's witnesses detailing his whereabouts on that night?

Under a fair construction of all the evidence, the Government has failed to show Nolan's participation in the mob. His alibi is well supported by competent proof, and his defense is sustained by the great weight of the evidence.

This is a fair statement of all the evidence, and it is respectfully insisted that it is insufficient to warrant a conviction in this case.

Petitioner respectfully prays the honorable court to rehear the case and review the evidence and discharge the rule for contempt against him, and as in duty bound he will ever pray.

SHEPHERD, FLEMING & SHEPHERD,
Attorneys for Petitioner.

LEWIS SHEPHERD,
Of Counsel.

Counsel for petitioner respectfully certify that the foregoing petition is not interposed for delay, and they further certify that they believe said petition is well founded in law.

SHEPHERD, FLEMING & SHEPHERD,
Attorneys for Petitioner.

LEWIS SHEPHERD,
Of Counsel.